NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)

1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE

(1) NATURE OF NEGLIGENCE

(i) In General: The Notional Duty to Take Care

1. The nature of negligence liability.

Negligence is a specific tort[1] and in any given circumstances is the failure to exercise that care which the circumstances demand[2]. What amounts to negligence depends on the facts of each particular case[3]. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all[4]. An act of negligence may also constitute a nuisance where it occasions a dangerous state of affairs and satisfies the other requirements of that tort[5]. Equally it may also be a breach of the rule in *Rylands v Fletcher*[6] if it allows the escape of a dangerous thing which the defendant has brought onto his land[7]. Negligent failure to maintain safety standards by an employer may give rise to both liability for negligence and for the tort of breach of statutory duty[8]. Negligent harm to reputation may give rise to both liability for negligence where it occurs within a special relationship causing economic loss[9], and for defamation[10]. Negligence liability may also overlap with non-tortious grounds of liability under contractual, equitable or public law principles[11]. This potential overlap may give rise to difficulties where negligence principles point in a different direction from, for example, those of equity, and on occasion the courts have found it necessary to limit the scope of negligence liability by reference to the other non-tortious principles in order to maintain the coherence of the law[12]. However, unless there is some inconsistency between the tortious duty and the other duties, it will be open to the claimant to claim in negligence, for the law of tort is the general law[13]. Subject to these qualifications, negligence liability has a wide potential and for this reason the courts have developed the concept of the duty of care to limit its scope[14].

1 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 103, PC, per Lord Wright. As to the law of tort generally see **TORT**.

2 *Vaughan v Taff Vale Rly Co* (1860) 5 H & N 679 at 688 per Willes J ('the absence of care according to the circumstances'); *Heaven v Pender* (1883) 11 QBD 503 at 507, CA; *Cunnington v Great Northern Rly Co* (1883) 49 LT 392, CA; *Glasgow Corpn v Muir* [1943] AC 448 at 456, [1943] 2 All ER 44 at 48, HL, per Lord Macmillan; *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL.

3 *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at 392, HL, per Lord Dunedin. 'Negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life': *Hay (or Bourhill) v Young* [1943] AC 92 at 107, [1942] 2 All ER 396 at 404, HL, per Lord Wright. An apology, an offer of treatment or other redress, does not of itself amount to an admission of negligence or breach of statutory duty: Compensation Act 2006 s 2.

4 *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 at 784 per Alderson B ('negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do').

5 See generally **NUISANCE**.

6 *Rylands v Fletcher* (1868) LR 3 HL 330. As to the rule in *Rylands v Fletcher* see **NUISANCE** vol 78 (2010) PARA 148.

7 *A-G v Gory Bros & Co Ltd* [1921] 1 AC 521 at 536, HL, per Lord Haldane. However, negligence need not be proved in order to establish liability under the rule: see further **NUISANCE** vol 78 (2010) PARA 149. Negligence must also be distinguished from trespass (see **TORT**) and from fraud (see *Kettlewell v Watson* (1882) 21 ChD 685 at 706 (on appeal (1884) 26 ChD 501, CA); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 764).

8 See **TORT** vol 45(2) (Reissue) PARA 395 et seq.

9 *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL.

10 As to defamation generally see **LIBEL AND SLANDER**.

11 This includes liability for breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (commonly referred to as the 'European Human Rights Convention') enforceable under the Human Rights Act 1998: see eg *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 1 AC 681, [2009] 1 All ER 1053 (obligation under art 2 of the Convention to protect the right to life).

12 'The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss . . . If the defined equitable duties attaching to [inter alia] mortgagees . . . are replaced or supplemented by a liability in negligence the result will be confusion and injustice': *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 316, [1993] 3 All ER 626 at 638, PC.

13 '[G]iven that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him . . .': *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 194, [1994] 3 All ER 506 at 532, HL, per Lord Goff of Chieveley.

14 See PARA 2 et seq.

2. The duty of care.

The defendant must owe a duty of care in relation to the general class within which the claimant and the type of damage that has arisen fall before there can be any question of liability to the claimant in question. Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence[1]. However strong the facts of the claimant's particular claim, it will fail unless the defendant owes a duty to take care in the kind of relationship in question[2]. Arguments in favour of a duty on the particular facts of the claimant's case may be outweighed by counter arguments relating to the general class of relationship within which the claimant's case falls to be assessed[3]. The level of generality at which the notional duty is pitched is crucial. The wider the scope of the alleged notional duty, the more difficult it will be to justify liability in all the situations falling within it. The narrower the scope of the duty, the easier it will be to justify liability in all situations falling within its scope[4]. Once a notional duty of a given scope has been accepted, then the question is whether, on the particular facts, the claimant comes within the scope of that duty so as to render the damage actionable at his suit, that is the question becomes one of factual duty[5]. A factual duty of care is owed only to those persons who are in the area of objectively[6] foreseeable danger[7]; the fact that the act of the defendant violated his duty of care to a third person does not enable

the claimant who is also injured by the same act to claim unless he is also within the area of foreseeable danger[8]. The same act or omission may accordingly in some circumstances involve liability for negligence[9], although in other circumstances it will not do so[10].

1 *Le Lievre v Gould* [1893] 1 QB 491 at 497, CA, per Lord Esher MR; *Scholfield v Earl of Londesborough* [1895] 1 QB 536 at 541, CA (affd [1896] AC 514, HL); *Australian Steam Shipping Co Ltd v Devitt* (1917) 33 TLR 178; *Bottomley v Bannister* [1932] 1 KB 458 at 476, CA; *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 618, HL, per Lord Macmillan; *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 103, PC.

2 'The concept of the duty of care . . . remains an integral part of the way the courts determine whether there is liability for negligence': *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [98], [2005] 2 AC 373 at [98], [2005] 2 All ER 443 at [98] per Lord Rodger of Earlsferry. See also *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256; *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490; *Trent Strategic Health Authority v Jain* [2009] UKHL 4, [2009] 1 All ER 957, [2009] 2 WLR 248.

3 See eg *Capital and Counties plc v Hampshire County Council* [1997] QB 1004, [1997] 2 All ER 865, CA, where it was held that there is no duty of care owed by a fire brigade to respond to an emergency.

4 Thus the ambulance service owes a duty as part of the health service and is in a different category from the fire service or the police (*Kent v Griffiths* [2001] QB 36 at [55], [2000] 2 All ER 474 at [55] per Lord Woolf MR) and the British Boxing Board of Control owes a professional boxer a duty of care to minimise or control the risks inherent in the sport (*Watson v British Boxing Board of Control Ltd* [2001] QB 1134, [2001] 1 WLR 1256, CA), but a research body which produced a report into the chemistry of drinking water in Bangladesh did not owe a duty of care to drinkers of the water (*Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All ER 490).

5 See *Hay (or Bourhill) v Young* [1943] AC 92 at 106-111, [1942] 2 All ER 396 at 404-406, HL, per Lord Wright.

6 'The standard of foresight of the reasonable man is in one sense an impersonal test. It eliminates the personal equation and is independent of idiosyncrasies of the particular person whose conduct is in question. Some persons are unduly timorous and imagine every path beset with lions; others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence': *Glasgow Corpn v Muir* [1943] AC 448 at 457, [1943] 2 All ER 44 at 48, HL, per Lord Macmillan. 'A reasonable man does not mean a paragon of circumspection': *A C Billings & Sons Ltd v Riden* [1958] AC 240 at 255, [1957] 3 All ER 1 at 8, HL, per Lord Reid. See also *Vaughan v Menlove* (1837) 3 Bing NC 468; *Cornman v Eastern Counties Rly Co* (1859) 4 H & N 781 at 786 per Bramwell B; and *Carstairs v Taylor* (1871) LR 6 Exch 217 at 222 per Bramwell B.

7 *Hay (or Bourhill) v Young* [1943] AC 92, [1942] 2 All ER 396, HL; *Best v Samuel Fox & Co Ltd* [1952] AC 716 at 730-731, [1952] 2 All ER 394 at 397-398, HL; *Tolhausen v Davies* (1888) 58 LJQB 98; *Thomas v Quartermaine* (1887) 18 QBD 685 at 694, CA, per Bowen LJ ('The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody').

8 The claimant cannot build on a wrong to someone else: *Hay (or Bourhill) v Young* [1943] AC 92 at 108, [1942] 2 All ER 396 at 404, HL, per Lord Wright, and at 116-117 and 409 per Lord Porter; *Carmarthenshire County Council v Lewis* [1955] AC 549 at 565-566, [1955] 1 All ER 565 at 571-572, HL, per Lord Reid, and at 571 and 576 per Lord Keith of Kinkel.

9 *Degg v Midland Rly Co* (1857) 1 H & N 773 at 781, where Bramwell B said that negligence is always relative to some circumstance of time and place or person.

10 See also the offence of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007, which applies in circumstances where an organisation owes a duty of care to the victim under the law of negligence: see further **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3. Causation.

The claimant must prove that the defendant's wrongdoing was a cause, although not necessarily the sole or dominant cause, of his injuries[1]. Whereas the act or default of the claimant may serve to reduce or extinguish his damages by reason of contributory negligence[2] or by his failure to mitigate his loss[3], the claimant's act has no such effect if the wrongdoer has exposed him to peril and the claimant has not acted unreasonably in all the circumstances[4]. Where the damage is a direct result of the conduct of a third party and only indirectly the consequence of the defendant's conduct, the defendant may still be held responsible[5]. The courts may determine the scope of the defendant's responsibility at the level of notional duty or by reference to the principles of causal responsibility[6]. The notional duty approach may be more appropriate when the question is whether the general causal pattern could give rise to a duty[7]; and causation or remoteness may be more appropriate in determining liability when the question is whether liability is justified on the particular facts of the case[8]. In general, a defendant who commits a wrong takes his victim as he finds him; it is no answer to a claim for damages to say that the victim would have sustained no or less injury if he had not suffered from some pre-existing condition[9].

1 See *Corr (adminstratrix of Corr deceased) v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884, [2008] 2 All ER 943, in which liability was imposed upon an employer for the subsequent suicide of the victim of a work accident which had resulted in severe depression; and **DAMAGES**. See also *Spencer v Wincanton Holdings Ltd* [2009] EWCA Civ 1404, [2009] All ER (D) 194 (Dec).

2 See PARA 75; and **DAMAGES** vol 12(1) (Reissue) PARA 876 et seq.

3 See **DAMAGES** vol 12(1) (Reissue) PARA 859.

4 See **DAMAGES** vol 12(1) (Reissue) PARA 851 et seq.

5 As to contributory negligence see PARA 75 et seq.

6 See **DAMAGES** vol 12(1) (Reissue) PARA 854. The courts are not consistent in their analysis of the problem and frequently merge the questions of duty and causation: see *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA.

7 See *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, [1993] 1 WLR 976, CA (unreasonable to impose a duty on the public generally to secure their vehicles to prevent them being stolen and used to cause damage to third parties).

8 See *Wright v Lodge* [1993] 4 All ER 299, [1993] RTR 123, CA.

9 This is sometimes referred to as the 'eggshell skull' rule: see **DAMAGES** vol 12(1) (Reissue) PARA 858.

4. The test for determining notional duty of care.

The categories of negligence are never closed[1]. When considering whether a notional duty of care applies in a particular situation, the courts will consider three questions: (1) whether the damage is foreseeable; (2) whether there is a relationship of proximity between the parties; and (3) whether the imposition of a duty would be fair, just and reasonable[2].

The criteria of foreseeability and proximity are derived from the seminal speech of Lord Atkin in *Donoghue v Stevenson*[3]. Reasonable foreseeability focuses on the knowledge that someone in the defendant's position would be expected to possess[4], whilst proximity focuses on the

broader relationship between the parties from the perspective of both defendant and claimant, and may consist of various forms of closeness: physical, circumstantial, causal or assumed[5].

In addition to public policy considerations, it is a requirement of ordinary reason and common sense that the court must be satisfied that in the circumstances it is fair and reasonable for a duty of care to be owed to the persons concerned[6]. At its narrowest, this criterion focuses on the relationship between the parties and, in particular, the proportionality of the burden of liability in relation to the nature of the conduct[7]. Assessing the burden may involve considering the relative exposure to risk of the class of claimant[8] and defendant concerned and the availability of protection through insurance[9] or contractual arrangements[10]. At a broader level, the criterion may involve consideration of the so-called 'floodgates argument'[11], the overall framework of the legal system[12], and wider concerns about the evidentiary difficulties and length of litigation following the imposition of a duty[13]. At the broadest level, perceptions of community attitudes[14] and goals[15], contemporary commercial practices[16] and the general public good[17] may also be relevant. However, judges are reluctant to consider broader consequential arguments when they have neither the full information nor the basis on which to evaluate the information that is presented[18].

The courts apply the three criteria in an incremental manner, paying particular attention to the similarity or otherwise of any proposed duty situation to others that have already been recognised[19].

1 See *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 619, HL, per Lord Macmillan.

2 'What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other': *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617-618, [1990] 1 All ER 568 at 573-574, HL, per Lord Bridge of Harwich. This has been cited in numerous subsequent cases: see eg *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 333, [1994] 3 All ER 129 at 159, HL, per Lord Slynn of Hadley; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 at 235, sub nom *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1995] 3 All ER 307 at 326, HL, per Lord Steyn; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [100], [2005] 2 AC 373 at [100], [2005] 2 All ER 443 at [100] per Lord Rodger of Earlsferry; *Brooks v Metropolitan Police Comr* [2005] UKHL 24 at [17], [2005] 2 All ER 489 at [17], [2005] 1 WLR 1495 at [17] per Lord Steyn; *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28 at [32], [2007] 1 AC 181 at [32], [2006] 4 All ER 256 at [32] per Lord Hoffman.

3 'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question': *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 580, HL, per Lord Atkin. Proximity in this sense is not confined to mere physical proximity but extends to close and direct relations between the parties (see *M'Alister (or Donoghue) v Stevenson* at 581). In this case the scope of the notional duty owed by a manufacturer to a consumer was defined by the requirement that injury to the consumer be foreseeable and that there be proximity in the sense that the product was intended to reach the ultimate consumer in the form in which it left the manufacturer, with no reasonable possibility of intermediate examination.

4 'The question 'Who is my neighbour?' prompts the response, 'Consider first those who would consider you to be their neighbour'': *James McNaughton Papers Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 at 126, [1991] 1 All ER 134 at 145, CA, per Neill LJ.

5 '[Proximity] involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what might (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken

by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case': *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55-56, Aust HC, per Deane J.

6 See *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256 (not fair and reasonable for a bank to owe a duty of care to a third party which had obtained a freezing order against one of its customers). See also *Kapfunde v Abbey National plc* [1999] ICR 1, [1998] IRLR 583, CA (doctor retained as occupational health adviser did not owe a duty of care to job applicant). Cf *Perrett v Collins* [1998] 2 Lloyd's Rep 255, CA (duty of care owed to passenger in aircraft by inspector and certifying authority who certified the aircraft, which subsequently crashed, as fit to fly). See also *Kent v Griffiths* [2001] QB 36, [2000] 2 All ER 474, CA (ambulance service could owe a duty of care to an individual after accepting an emergency call for assistance in respect of that individual).

7 '[I]t may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers and ultimately on the class of persons insured . . .': *McLoughlin v O'Brian* [1983] 1 AC 410 at 421, [1982] 2 All ER 298 at 304, HL, per Lord Wilberforce (in relation to policy reasons for restricting the duty of care relating to nervous shock). The burden on the defendant may have to be compared with that to be borne by the claimant if no duty is imposed: see *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL (claimant's burden of proving defamation liability in respect of an inaccurate reference provided by his ex-employer if no duty of care was to be imposed, more than outweighed the burden of such a duty on the employer).

8 In *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL, the fact that but for negligence liability the non-purchasing consumer would be left with no remedy at all, was a key factor in justifying the duty.

9 See eg *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295 at 302, sub nom *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1990] 3 All ER 330 at 335 per Hoffmann J; on appeal sub nom *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, sub nom *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA. See also *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL (surveyor); *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL (accountant).

10 See *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA.

11 '[T]he court . . . has to be alive to the consequences of a decision that one particular set of facts gives rise to a duty of care and to consider carefully whether there is a line to be drawn beyond which a duty of care is not recognised and, if so, where to draw the line. Floodgates arguments are not always attractive where they imply that the court is unable to express itself with sufficient precision, but the nature of the subject matter sometimes means that you cannot include one plaintiff's case without also encompassing many others': *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448 at 460, [1992] RTR 254 at 266 per May J; on appeal [1993] 3 All ER 448, [1993] 1 WLR 976, CA.

12 Eg that it would not be just and reasonable to impose negligence liability if the rights and duties of the parties have been clearly defined by equity (see *Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295 at 316, [1993] 3 All ER 626 at 638, PC: 'The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage . . . If the defined equitable duties attaching to [inter alia] mortgagees . . . are replaced or supplemented by a liability in negligence the result will be confusion and injustice'), statute (see *Deloitte Haskins and Sells v National Mutual Life Nominees Ltd* [1993] AC 774, [1993] 2 All ER 1015, PC) or other tort actions (see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, [1988] 2 All ER 484, HL (the statutory action for breach of copyright and the tort action for procurement of breach of copyright could not be supplemented by a duty to undertake not to facilitate a breach of copyright)).

13 Eg in relation to psychiatric damage: see *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL.

14 Thus the need to avoid unfairness between different groups of litigants, and to promote 'distributive justice', may lead to rejection of claims which might otherwise have been allowed: see *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1999] 1 All ER 1, HL (psychiatric damage).

15 See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 312, NZ CA, per Casey J. The existence of statutory regulation may also be taken as evidence of the common law duty: see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* at 298 per Cooke P. However, in other situations it may be taken as evidence that the claimant is so adequately protected that a further common law remedy would not be just and reasonable: see *Jones v Department of Employment* [1989] QB 1 at 25, [1988] 1 All ER 725 at 739, CA, per Slade LJ; and *Murphy*

v Brentwood District Council [1991] 1 AC 398 at 457, [1990] 2 All ER 908 at 912, HL, per Lord Mackay of Clashfern.

16 See *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 352, [1994] 3 All ER 129 at 177, HL, per Lord Woolf.

17 Thus a duty has been denied on the grounds that it would lead to defensive policing (see *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [2008] 3 All ER 977; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238, HL; *Brooks v Metropolitan Police Comr* [2005] 2 All ER 489, [2005] 1 WLR 1495, HL; and PARA 17) or could inhibit doctors in child abuse cases (see *D v East Berkshire Community NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, [2005] 2 All ER 443), or lead to defensive regulatory activity (see *Yuen Kun Yeu v A-G of Hong Kong* [1988] AC 175, [1987] 2 All ER 705, PC).

18 See *McLoughlin v O'Brian* [1983] 1 AC 410 at 431, [1982] 2 All ER 298 at 311, HL, per Lord Scarman (considerations of social, economic and financial policy were not considered such as to be capable of being handled within the limits of the forensic process).

19 'It is preferable . . . that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed': *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43-44, Aust HC, per Brennan J (cited with approval in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 618, [1990] 1 All ER 568 at 574, HL, per Lord Bridge of Harwich). See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 295, NZ CA, per Cooke P.

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5. Direct physical damage.

The three criteria of (1) foreseeability; (2) proximity; and (3) fairness, justice and reasonableness for determining the existence of a notional duty of care[1] will be applied to all novel situations whatever the nature of the loss (that is whether it is economic or physical)[2]. Where the loss to the claimant is caused by direct physical damage[3] the three criteria will normally be satisfied[4], and in the absence of a general immunity from tortious liability[5], a duty will be owed.

1 See PARA 4.

2 See *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 at 235, sub nom *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1995] 3 All ER 307 at 326, HL, per Lord Steyn.

3 As to the nature of the duty owed in common situations of direct physical damage see PARAS 29-61.

4 'In the straightforward case of the direct infliction of a physical injury . . . there is . . . no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a 'proximate' relationship with the plaintiff': *Murphy v Brentwood District Council* [1991] 1 AC 398 at 486-487, [1990] 2 All ER 908 at 934, HL, per Lord Oliver of Aylmerton. It is generally self evident that a duty exists in claims in respect of physical damage: see *Mobil Oil Hong Kong Ltd and Dow Chemical (Hong Kong) Ltd v Hong Kong United Dockyards Ltd, The Hua Lien* [1991] 1 Lloyd's Rep 309 at 328-329, PC.

5 As to liability in tort see **TORT** vol 45(2) (Reissue) PARAS 318-345.

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(ii) Duty of Care: Particular Problems

6. The foetus and family relationships.

In respect of births after the passing of the Congenital Disabilities (Civil Liability) Act 1976[1] there is a statutory right of action available to a child who is born alive but with disabilities which would not otherwise be present because of an occurrence before its birth which affected either parent's ability to have a normal healthy child, or affected the mother during pregnancy, or affected her or the child in the course of its birth[2]. Births prior to the commencement of the Act[3] are governed by the common law which, after a period of some uncertainty, now provides the duty to take care not to cause damage to a newly born child through injuries inflicted whilst the child was en ventre sa mere[4]. No claim can be brought by a child for negligence in failing to prevent its birth given the disabilities it was known to be likely to suffer[5]. Such 'wrongful life' claims are contrary to public policy as violations of the sanctity of life[6]. This public policy argument also prevents parents from claiming the full cost of bringing up a healthy child where the defendant negligently failed to prevent the birth[7]. Parents in such 'wrongful birth' cases are, however, entitled to a 'conventional sum' of £15,000[8]. The mother is also entitled to compensation for the pain, discomfort and inconvenience of the unwanted pregnancy and birth[9].

There is no right of action for negligent interference with parental rights[10]. Parents owe children a duty of care but the standard of care to be expected of them must be considered in the light of domestic circumstances[11].

1 See the Congenital Disabilities (Civil Liability) Act 1976 s 4(5); and **TORT** vol 45(2) (Reissue) PARA 339. The Act was passed on 22 July 1976.

2 See Congenital Disabilities (Civil Liability) Act 1976 s 1. A defendant is answerable to the child if he was liable in tort to the parent or would if sued in due time have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability: s 1(3). The child's mother is liable only where she is driving a motor vehicle when she knows (or ought reasonably to know) herself to be pregnant and in consequence of her breach of the duty to take care for the safety of the unborn child it is born with disabilities which would not otherwise have been present: see s 2; and **TORT** vol 45(2) (Reissue) PARA 339.

3 See note 1.

4 *Burton v Islington Health Authority* [1993] QB 204, [1992] 3 All ER 833, CA. See also *Watt v Rama* [1972] VR 353; and *Lynch v Lynch* (1991) [1992] 3 Med LR 62, NSW CA.

5 *McKay v Essex Area Health Authority* [1982] QB 1166, [1982] 2 All ER 771, CA (disabled child's claim that the doctor owed her a duty of care to advise mother with rubella on an abortion rejected); cf *Cherry v Borsman* (1992) 94 DLR (4th) 487, BC CA (doctor responsible for failed abortion held to owe duty). The Congenital Disabilities (Civil Liability) Act 1976 s 1(2)(b) gives the child no right of action for 'wrongful life' as actions under the Act are limited to 'disabilities which would not otherwise have been present' (see s 1(2)) but for the negligence; the assumption is that the child would otherwise have been born normal and healthy, not that the child would not have been born at all: see *McKay v Essex Area Health Authority* above at 1178 and at 779 per Stephenson LJ.

6 See *McKay v Essex Area Health Authority* [1982] QB 1166 at 1180, [1982] 2 All ER 771 at 780, CA, per Stephenson LJ.

7 See *McFarlane v Tayside Health Board* [2000] 2 AC 59, [1999] 4 All ER 961, HL (failed vasectomy).

8 See *Rees Darlington Memorial NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, [2003] 4 All ER 987.

9 *McFarlane v Tayside Health Board* [2000] 2 AC 59, [1999] 4 All ER 961, HL.

10 *F v Wirral Metropolitan Borough Council* [1991] Fam 69, [1991] 2 All ER 648, [1991] 2 FLR 114, CA; *Re S (a minor) (Parental Rights)* [1993] Fam Law 572.

11 *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559, [1991] Fam Law 426, CA (foster parents held to owe the same duty of care as ordinary parents to their children). As to the standard of care see PARA 21 et seq.

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7. Exercise of property rights.

An occupier of land owes no duty of care to a neighbour specifically in relation to the extraction of water from his land[1] although he may be liable if he deprives the latter's land of support and thereby causes a collapse of land or buildings[2].

An occupier owes duties to various classes of persons entering upon his land but at common law he does not owe a duty to visitors when reasonable notice has been given that the visitor enters at his own risk[3].

1 *Chasemore v Richards* (1859) 7 HL Cas 349, [1843-60] All ER Rep 77; *Bradford Corpn v Pickles* [1895] AC 587, HL (landowner had no right to the flow of water from his neighbour's land and hence the latter was entitled to interfere with that flow as he wished); *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA (defendant owed the plaintiff no duty of care as he had an unqualified right to extract water from his land regardless of the consequences, whether physical or pecuniary, to his neighbour). See further **WATER AND WATERWAYS** vol 100 (2009) PARAS 104 et seq, 220.

2 *Lotus Ltd v British Soda Co Ltd* [1972] Ch 123, [1971] 1 All ER 265 (landowner successful in action against a neighbour whose activity in liquefying rock salt beneath his land and extracting it in the form of brine deprived the former's land of support and caused the collapse of his buildings).

3 See *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA. The freedom of occupiers to restrict business liability is, however, now severely curtailed by the Unfair Contract Terms Act 1977: see PARAS 38, 74. As to occupiers' liability generally see PARA 29 et seq.

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8. Wrongdoers.

No duty will be owed by one participant in an illegal enterprise to another joint participant where the circumstances are such that it is not possible to determine the particular standard of care which should be observed[1]. It was once suggested that public policy would also bar a claim where the defendant's negligence had led to the plaintiff's suicide or attempted suicide[2]. It is now clear, however, that a duty may be owed to protect a person from the risk of suicide and that in such circumstances a claim will not be barred on the ground of public policy or volenti non fit injuria[3], although the damages may be reduced on the ground of contributory negligence by the deceased[4]. Where the defendant's negligence has resulted in injury to the claimant which makes him suicidal, further injury sustained through a suicide attempt will not be regarded as too remote to be recoverable[5]. Under the provisions of the Occupiers' Liability Act 1984, a duty is owed to a trespasser even if he is engaged in burglary[6]. However, public policy will prevent claimants detained by order of a court from recovering their loss of earnings, even if their offending behaviour resulted from personality changes caused by the defendants'

negligence[7]. Liquidators of a company wholly controlled by a fraudster will be barred by public policy from suing the company's auditors for their negligent failure to detect the fraud[8].

1 *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA (plaintiff motorcycle passenger, knowing the defendant driver of it to be intoxicated, actively encouraged him to drive in dangerous manner), approving *Jackson v Harrison* (1978) 138 CLR 438, Aust HC. See also *Gala v Preston* (1991) 172 CLR 243, Aust HC. In *Hall v Hebert* (1993) 101 DLR (4th) 129, Can SC, McLachlin J limited the maxim ex turpi causa non oritur actio (no right of action arises from a base cause) to situations where to allow the claim would undermine the integrity of the legal system. See also *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249, [2002] 3 All ER 78, [2002] 1 WLR 218 (no damages for injuries sustained while attempting to escape from police custody). As to the application of the maxim ex turpi causa non oritur actio see **DAMAGES** vol 12(1) (Reissue) PARA 835.

2 See *Hyde v Tameside Area Health Authority* (1981) reported at (1986) 2 PN 26 at 29, CA, per Lord Denning MR.

3 As to the defence of volenti non fit injuria see PARA 69 et seq.

4 See *Reeves v Metropolitan Police Comr* [2000] 1 AC 360, [1999] 3 All ER 897, HL.

5 *Corr (adminstratrix of Corr deceased) v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 2 All ER 943 (the suicide of the claimant's husband was directly traceable to the injury at work for which the defendant's negligence was responsible). See also *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121.

6 See *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA; and PARA 40.

7 *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 4 All ER 81, [2009] 3 WLR 167.

8 *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2008] 1 AC 884, [2009] 3 WLR 455, [2009] All ER (D) 330 (Jul).

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9. Rescuers.

Where a defendant has negligently created a situation endangering life or property, he may be liable to a claimant who suffers injury as a direct result of attempting a rescue[1]. The duty to a rescuer is independent of any duty to the party rescued[2]. A rescuer may also have a claim against another who unsuccessfully attempts rescue if that has led to an increased danger[3]. The rescuer can only recover where the rescue attempt is reasonably foreseeable[4]. A rescue attempt by someone with a professional responsibility to assist the public, for example a policeman[5], fireman[6] or doctor[7], will be readily foreseeable, but it has been held that the coastguard does not owe a duty of care to persons in distress in the context of a search and rescue operation[8]. The nature of the emergency may render it foreseeable that a member of the public will intervene[9]. It may be foreseeable that an individual will attempt to rescue his own[10] or his employer's property[11] endangered by the defendant's negligence. It has been held that if the particular manner in which the rescuer was injured was unforeseeable, there is no liability even if the rescue attempt itself was foreseeable[12]. However, this is doubtful[13] and, where the method of rescue is unforeseeable because it is unreasonable, it may be more appropriate to reduce damages for contributory negligence[14].

1 *Haynes v Harwood* [1935] 1 KB 146, CA. 'Danger invites rescue . . . The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer': *Wagner v International Rly Co* 232 NY Rep 176 (1921) at 180 per Cardozo J, cited in *Ward v T E Hopkins & Son Ltd* [1959] 3 All ER 225 at 230, sub nom *Baker v T E Hopkins & Son Ltd* [1959] 1 WLR 966 at 972, CA, per Morris LJ. To be compensated for pure psychiatric harm the claimant must satisfy the threshold requirement that he objectively exposed himself to personal danger or

reasonably believed that he was doing so: *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, [1999] 1 All ER 1, HL.

2 A defendant may owe a duty to the rescuer even though he owes no duty to the victim: *Videan v British Transport Commission* [1963] 2 QB 650, [1963] 2 All ER 860, CA (a trespasser on a railway line injured by a negligent train driver was unable to recover, but the rescuing stationmaster was owed a duty of care as it was foreseeable that someone would be endangered by the negligent driving and hence, injury to a potential rescuer was also foreseeable). A defendant who negligently imperils himself can be liable to a rescuer for damage sustained in a rescue attempt although clearly the defendant owes himself no duty to preserve his own safety: see *Harrison v British Railways Board* [1981] 3 All ER 679 at 685 per Boreham J. Indeed, there is no need for there to be anyone in actual danger, provided it is foreseeable that a rescuer could reasonably perceive there to be a danger: *Ould v Butler's Wharf Ltd* [1953] 2 Lloyd's Rep 44.

3 See *Horsley v MacLaren, The Ogopogo* [1971] 2 Lloyd's Rep 410, 22 DLR (3d) 545, Can SC, cited in *Harrison v British Railways Board* [1981] 3 All ER 679 at 685. See also *McFarlane v E E Caledonia Ltd* [1994] 2 All ER 1, [1994] 1 Lloyd's Rep 16, CA.

4 Hence there will be no recovery in respect of a rescue attempt which takes place after the danger itself has passed: *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, CA.

5 *Haynes v Harwood* [1935] 1 KB 146, CA.

6 *Ogwo v Taylor* [1988] AC 431, [1987] 3 All ER 961, HL.

7 *Ward v T E Hopkins & Son Ltd* [1959] 3 All ER 225, sub nom *Baker v T E Hopkins & Son Ltd* [1959] 1 WLR 966, CA.

8 *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897, [1997] NLJR 1099.

9 *Chadwick v British Transport Commission* [1967] 2 All ER 945, sub nom *Chadwick v British Railways Board* [1967] 1 WLR 912 (train crash with many dead and injured).

10 *Hutterly v Imperial Oil Ltd and Calder* (1956) 3 DLR (2d) 719, Ont HC.

11 *Hyett v Great Western Railway* [1948] 1 KB 345, [1947] 2 All ER 264, CA. See also *D'Urso v Sanson* [1939] 4 All ER 26; *The Gusty and the Daniel M* [1940] P 159 (sailors going to the aid of another ship in distress); *Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101; *Russell v McCabe* [1962] NZLR 392, NZ CA.

12 *Crossley v Rawlinson* [1981] 3 All ER 674, [1982] 1 WLR 369.

13 See *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL, where it was held that it is the kind of injury and not the manner of its causation which had to be foreseen. Therefore it is submitted that, provided it is reasonably foreseeable that there will be a rescue attempt and that this will carry risk of physical injury to the rescuer, the manner in which the injury is actually caused should not be relevant.

14 See *Harrison v British Railways Board* [1981] 3 All ER 679, where a guard, injured in attempting to rescue a passenger trying to board a moving train, was found to be contributorily negligent because he had tried to grab the passenger rather than following rules and applying the hand brake. However, it is rarely appropriate to find a rescuer guilty of contributory negligence: see *Harrison v British Railways Board* at 686 per Boreham J.

10. Liability for omissions.

The courts are unwilling to hold that a person is liable for failure to act. It is not enough that harm is a foreseeable consequence of that omission; a bystander is not liable for carelessly allowing a blind man to walk over a cliff to his death without warning him of the danger[1]. However, a duty to act may be imposed where the defendant has undertaken a responsibility for the claimant himself[2], or for property or for third parties causing damage to the claimant. Responsibility for the claimant may be based on the general nature of the relationship[3], or the

specific conduct of the defendant either by exposing the claimant to danger[4], or by creating an expectation that he will act to protect the claimant[5]. An ineffective intervention may also lead to liability if it leaves the claimant in a worse condition[6]. The duty owed by an occupier of land may require positive action to control natural conditions which endanger visitors[7] or neighbouring occupiers[8], but it is still the case that a bare landlord owes no duty of care to take positive action to ensure the habitability of the property[9]. An owner of personal property apparently owes no duty of care to anyone else to safeguard his own interests in it[10].

1 See *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1060, [1970] 2 All ER 294 at 326, HL, per Lord Diplock. '[T]he common law does not impose liability for what are called pure omissions': *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 271, [1987] 1 All ER 710 at 729, HL, per Lord Goff of Chieveley. As to the political, moral and economic reasons for the reluctance to impose a duty to prevent harm or render assistance see *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 944, [1996] 3 All ER 801 at 819, HL, per Lord Hoffmann.

2 See *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2009] 2 WLR 1065, [2008] All ER (D) 155 (Dec) (firm of bookmakers assumed a limited duty to prevent a compulsive gambler from placing bets with them; claim failed on the facts).

3 Eg parental relationships (see *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559, [1991] Fam Law 426, CA (parent); *Barnes v Hampshire County Council* [1969] 3 All ER 746, [1969] 1 WLR 1563, HL (school)), custodial relationships (see *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149, CA (prison); *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, [1990] 3 All ER 246, CA (police); *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550, [1999] ICR 752, CA (police officer held to owe duty of care to assist fellow officer who is being attacked, where failure to assist will cause or exacerbate injuries); *Porterfield v Home Office* (1988) Times, 9 March (prison authorities)) or health care relationships (see *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428, [1968] 1 All ER 1068 (a National Health Service casualty department is under a duty to treat a patient arriving in an emergency)). Note the analogous situation in *Barrett v Ministry of Defence* [1995] 3 All ER 87, [1995] 1 WLR 1217, CA, where naval authorities were held to owe a drunken naval airman a duty of care once they assumed responsibility for his condition after his collapse. See also *Jebson v Ministry of Defence* [2000] 1 WLR 2055, [2001] RTR 22, CA (carrier had duty to supervise behaviour of drunken passengers in back of lorry). It has been argued that accident victims should be entitled to an ambulance system or emergency service reasonably capable of responding to those who depend upon it: see Newdick 'Rights to NHS Resources after the 1990 Act' (1993) 1 Med Law Rev 53 at 66. However, a health authority is under no duty to provide treatment when resources do not permit and the courts will not 'question the judgment of those who are responsible for the allocation of resources': see *R v Central Birmingham Health Authority, ex p Walker* (1987) 3 BMLR 32 at 35, CA, per Sir John Donaldson MR.

4 See *Jordan House Ltd v Menow and Honsberger* (1973) 38 DLR (3d) 105, Can SC (hotel owner ejecting intoxicated patron knowing that he would have to cross a dangerous highway); and *Crocker v Sundance Northwest Resorts Ltd* (1988) 51 DLR (4th) 321, Can SC (defendant allowing intoxicated plaintiff to take part in dangerous ski race). The imposition of a duty in *Jordan House Ltd v Menow and Honsberger* and *Crocker v Sundance Northwest Resorts Ltd* above rested 'on factors additional to the mere provision of alcohol and the failure strictly to enforce provisions against drunkenness': *Barrett v Ministry of Defence* [1995] 3 All ER 87 at 96, [1995] 1 WLR 1217 at 1225, CA, per Beldam LJ. In some cases the conduct of the drunken claimant may be such as to break the chain of causation: see *Munro v Porthkerry Park Holiday Estates Ltd* [1984] LS Gaz R 1368. See also *Joy v Newell (t/a The Copper Room)* [2000] NI 91.

5 See *Mercer v South Eastern and Chatham Rly Co's Managing Committee* [1922] 2 KB 549 (expectation that defendant would lock access to line when train was due). '[A] public authority, which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for the subsequent omission to exercise its powers . . .': *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 47, Aust HC, per Brennan J. In *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 954, [1996] 3 All ER 801 at 829, HL, Lord Hoffmann doubted whether liability could be based on general reliance on an authority stemming from the general community expectation rather than the specific knowledge of the plaintiff. See further PARA 18.

6 *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, [1940] 4 All ER 527, HL, where the plaintiff's land was flooded by seawater and the defendant board, although under no duty to repair the breach in the sea wall, did undertake such repairs but so negligently that the land remained flooded for much longer than it would had the repair been efficient. The House of Lords held that the board was not liable because its neglect did not inflict any more damage than would a total omission, the implication being that if additional damage had been caused by the negligent conduct of the repair there would have been liability.

7 As to the duty of care to visitors see PARA 29 et seq.

8 See *Goldman v Hargrave* [1967] 1 AC 645, [1966] 2 All ER 989, PC. This duty extends to both natural and man-made hazards occurring on the land: see *Goldman v Hargrave* at 661-662 and 995; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA; and *Bybrook Barn Garden Centre Ltd v Kent County Council* [2001] LGR 239, [2000] All ER (D) 2075, CA (liability for failure to widen a culvert, thereby causing flooding to neighbouring property). Where such a duty to take positive steps is imposed on a landowner the reasonableness of his actions will be judged subjectively by reference to the resources at his disposal and not objectively as would be the case in relation to those who undertake positive activities carrying the risk of damage: see *Goldman v Hargrave* above; *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 944, [1996] 3 All ER 801 at 819-820, HL, per Lord Hoffmann.

9 *Cavalier v Pope* [1906] AC 428, HL. The principle was extended to vendors of property in *Bottomley v Bannister* [1932] 1 KB 458, CA. However, in *Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, CA, it was held that it did not apply where the defects were due to design or building work by the landlord or vendor. Despite criticism in *Rimmer v Liverpool City Council*, it remains the case that the bare landlord or vendor (ie one who is not also a designer or builder) owes no common law duty to act positively in relation to habitability: see *McNerny v Lambeth London Borough Council* (1988) 21 HLR 188, CA. For duties under the Defective Premises Act 1972 see PARAS 43-44.

10 *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, [1976] 2 All ER 641, HL, where a finance company let a car on hire purchase but failed to record the agreement in a central register kept for the purpose by those involved in the hire purchase business. The hirer then sold the car to an innocent trader who was held liable in damages for conversion. The trader was held to have no action against the finance company, which owed him no duty of care. Similarly, it has been held that a bank customer owed no duty to his bank to take reasonable precautions to prevent forged cheques drawn on his account being presented, nor was he under a duty to check his bank statements so that he might warn the bank of possible fraud: *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC.

11. Responsibility for the conduct of third parties.

There is no general duty to prevent a third party from causing damage to another[1], but there are four special circumstances in which a duty may arise:

1 (1) where there is a special relationship between the defendant and the claimant based on an assumption of responsibility by the defendant[2];
2 (2) where there is a special relationship between the defendant and the third party based on control by the defendant over certain classes of persons[3];
3 (3) where the defendant is negligently responsible for a state of danger and it is reasonably foreseeable that a third party may interfere with it and cause damage by 'sparking off' the danger[4]; and
4 (4) where the defendant knows, or has the means of knowing, that the conduct of a third party on his property is endangering neighbouring property[5].

Liability under head (4) above will be rare[6].

1 See *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 272, [1987] 1 All ER 710 at 730, HL, per Lord Goff of Chieveley. 'Liability in negligence for harm caused by the deliberate wrong-doing of others cannot be founded simply on foreseeability that the pursuer will suffer loss or damage by reason of such wrong-doing. There is no such general principle': at 272 and 730 per Lord Goff of Chieveley. See also *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 3 All ER 205, [2009] 2 WLR 481, especially at [56] per Lord Rodger of Earlsferry.

2 Eg an undertaking to look after the claimant's property (*Stansbie v Troman* [1948] 2 KB 48, [1948] 1 All ER 599, CA, where a decorator who failed to carry out his undertaking to lock premises was held responsible for the

ensuing burglary) or child (*T (a minor) v Surrey County Council* [1994] 4 All ER 577, sub nom *Harrison v Surrey County Council* [1994] 2 FCR 1269 where the authority was responsible for abuse by child minder following advice to mother that the minder could be trusted). But see also *Fred Chappell Ltd National Car Parks Ltd* (1987) Times, 22 May (no duty on car park operator to check tickets of departing cars to prevent theft); *Plant Construction plc v Clive Adam Associates (a firm)* (1997) 86 BLR 119 (main contractor had not assumed responsibility for actions of sub-contractor by giving it advice).

3 As to control over children see *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL (education authority held liable for accident caused by child under its control); *Vicar of Writtle v Essex County Council* (1979) 77 LGR 656 (social services responsible for child placed in secure home). As to parental responsibility see *Smith v Leurs* (1945) 70 CLR 256, Aust HC; and *LaPlante v LaPlante* (1995) 125 DLR (4th) 569, BC CA (father liable to passengers in his car for allowing his qualified but inexperienced son to drive in dangerous icy conditions which led to an accident). See also *P v Harrow London Borough Council* [1993] 1 FLR 723, [1992] PIQR P296 (no liability for placement of child in school where teacher later convicted of child abuse).

As to control over prisoners see *Ellis v Home Office* [1953] 2 QB 135, [1953] 2 All ER 149, CA (prison authority liable to inmate attacked by detainee); but see now *Porterfield v Home Office* (1988) Times, 9 March (prison governor not in breach of duty to prisoner injured by fellow inmate); *Greenwell v Prison Comrs* (1951) 101 L Jo 486 (liability for damage done after the escape) doubted in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL (Home Office liable to those whose property was damaged during the course of an escape by detainees). See also *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238, HL; *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495 (police owe no general duty of care to individual members of the public to apprehend a criminal); and PARA 17.

As to control over patients see *Holgate v Lancashire Mental Hospitals Board, Gill and Robertson* [1937] 4 All ER 19 (liability for negligent release of mental patient) (doubted by Lord Diplock in *Home Office v Dorset Yacht Co Ltd* above); *Clunis v Camden and Islington Health Authority* [1998] QB 978, [1998] 3 All ER 180, CA (no liability for failure by health authority to supervise mental patient who went on to commit manslaughter). See also *Palmer v Tees Health Authority* [1999] All ER (D) 722, CA (health authority not liable for actions of patient who had threatened to, and did murder a child, because there was no relationship of proximity between the health authority and the child).

4 See *Haynes v Harwood* [1935] 1 KB 146, CA (a horse-drawn vehicle was left unattended in a busy street and a third party, by throwing a stone at the horses, caused them to bolt and cause injury); and *Rouse v Squires* [1973] QB 889, [1973] 2 All ER 903, CA (liability for damage caused by defendant who carelessly drove into another's negligent obstruction of the highway); cf *Wright v Lodge* [1993] 4 All ER 299, [1993] RTR 123, CA (no liability on the negligent obstructor of the highway if the driving of the third party was reckless rather than simply negligent). See also *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, [1993] 1 WLR 976, CA (no liability for leaving a minibus unlocked, with keys in the ignition, which was then stolen by a third party who negligently drove it into the plaintiff).

Such a danger as mentioned in head (3) in the text may include, for example, the negligent storage of fireworks in an unlocked shed to which naughty children may easily gain access: see *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 273, [1987] 1 All ER 710 at 731, HL, per Lord Goff of Chieveley. Liability under this principle is likely to be very rare for otherwise ordinary householders could be held liable for acting in a socially acceptable manner: see at 273 and 731 per Lord Goff of Chieveley. See also *Holian v United Grain Growers Ltd* (1980) 112 DLR (3d) 611, Man QB (theft of a poisonous chemical by young children).

Responsibility for handing car keys to a drunken or plainly incompetent third party who then causes a road traffic accident may fall under head (3) in the text: see *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342 at 359, [1983] 3 All ER 161 at 172, CA, per Goff LJ. Some North American jurisdictions have gone further, imposing liability on the commercial or social host who serves alcohol to customers or guests who then, being intoxicated, attempt to drive home and thereby cause an accident: see *Kelly v Gwinnell* 96 NJ 538 (1984), 476 A2d 1219 (1984) (social host); *Hague v Billings* (1993) 102 DLR (4th) 44, Ont CA (hotel); and *Mayfield Investments Ltd v Stewart* (1995) 121 DLR (4th) 222, Can SC (although the defendant restaurant owner who served drinks to a group of four customers owed a duty of care to the plaintiff who was subsequently injured on the highway as a result of the drunken driving of one of the group, the defendant was not liable as it was reasonable for him to assume that one of the two non-drinkers in the group would have driven the group's car.)

5 See *Thomas Graham & Co Ltd v Church of Scotland General Trustees* 1982 SLT 26, Sh Ct (occupiers of a disused church who knew that vandals had repeatedly entered and lit fires, were held liable for damage to neighbouring property caused by a fire spreading from the church); cf *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 710, HL (neighbouring property was damaged by fire spreading from the defendant's property after vandals had entered, but there was no liability because the defendant had no means of knowing of the fire risk created by third parties on its property).

6 See *Lamb v Camden London Borough Council* [1981] QB 625, [1981] 2 All ER 408, CA; *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, CA; and *King v Liverpool City Council* [1986] 3 All ER 544, [1986] 1 WLR 890, CA. See the comments of Lord Goff of Chieveley regarding these

cases in *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 279, [1987] 1 All ER 710 at 735, HL. See also the approval of those comments in *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 3 All ER 205, [2009] 2 WLR 481 (no general duty to warn another person that they may be at risk of a possible criminal act by a third party).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE/(1) NATURE OF NEGLIGENCE/(ii) Duty of Care: Particular Problems/12. Liability for psychiatric damage (nervous shock).

12. Liability for psychiatric damage (nervous shock).

A duty of care in relation to shock in the sense of psychiatric damage[1] is owed to those foreseeably and directly involved in the horrific event caused by the defendant's negligence[2]. Thus a claimant suffering shock through involuntary participation in the event itself[3], or through fear for his own safety in the face of the event[4], may recover damages[5]. A rescuer who seeks to be compensated for psychiatric harm must satisfy the threshold requirement that he objectively exposed himself to personal danger or reasonably believed that he was doing so[6]. Where the claimant is a primary victim, that is within the range of foreseeable physical injury, foreseeability of psychiatric illness is not necessary[7]. In other cases, however, the claimant will only recover damages if the nature of the event is such that a person of ordinary fortitude may foreseeably suffer shock[8].

Where the claimant suffers shock as a result of witnessing rather than participating in the horrific events, policy considerations dictate that the scope of the duty be limited by requirements additional to foreseeability[9]. First, the claimant must suffer the shock as a result of what he perceived through his own senses[10]. Suffering shock through being told of the events by a third party[11] or seeing them on television[12] is not sufficient. Secondly, there must be a close physical and temporal proximity between the claimant and the shocking events. Witnessing the injuries and distress of victims in hospital in the immediate aftermath of an accident may suffice, but seeing a corpse hours later will not[13]. Thirdly, there must generally be a close emotional tie between the claimant and the victims of the accident[14]. Such a tie will be presumed in the case of parental and spousal relationships but must be proved in other cases[15] unless the sheer horror of the event is such that the emotions of any witness would be deeply affected[16]. Finally, although recovery has generally been limited to situations where the defendant's negligent conduct has resulted in illness through a sudden assault on the claimant's mind rather than by an accumulation of feelings or distress[17], this is not always the case[18]. There is no recovery simply for grief at another's injury or death[19].

1 In *Attia v British Gas plc* [1988] QB 304 at 317, [1987] 3 All ER 455 at 462, CA, per Bingham LJ, the general expression 'psychiatric damage' was used in preference to 'nervous shock' which was considered to be misleading; and 'psychiatric damage' was intended to include all relevant forms of mental illness, neurosis and personality change. Normal human emotions which follow an unpleasant incident but which fall short of recognisable psychiatric injury are not compensatable: *Reilly v Merseyside Health Authority* (1994) 23 BMLR 26, CA.

2 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL. See also *Schofield v Chief Constable of West Yorkshire* [1999] ICR 193, 43 BMLR 28, CA (relationship between fellow police officers is sufficiently proximate to allow one officer to recover damages for psychiatric injuries caused by the negligent actions of the other); *Young v Charles Church (Southern) Ltd* (1997) 39 BMLR 146, CA (employee who suffered a severe psychiatric illness when his colleague, who was standing beside him, was electrocuted as a result of their employer's negligence, was entitled to recover damages for nervous shock). For a discussion of the law of Australia see *Tame v New South Wales; Annetts v Australian Stations PTY Ltd* [2002] HCA 35, [2002] ALR 449 (injury caused by clerical error not reasonably foreseeable; duty of care owed to parents by employer charged with taking care of son).

3 *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, where it was held that a crane driver who feared for the safety of fellow workmen imperilled by the defendant's carelessness with regard to the crane

could recover for nervous shock suffered by him. Cf *Monk v PC Harrington* [2008] EWHC 1879 (QB), [2009] PIQR P52, [2008] All ER (D) 20 (Aug) (claimant's belief that he had caused the accident had no reasonable belief: claim failed).

4 *Dulieu v White & Sons* [1901] 2 KB 669. However, the claimant must have been endangered: see *McFarlane v E E Caledonia Ltd* [1994] 2 All ER 1, [1994] 1 Lloyd's Rep 16, CA, where the plaintiff who was on a support vessel 100 metres from the blazing Piper Alpha oil rig was unable to recover for nervous shock from the rig's negligent owners as he was free to take shelter if he wished and, hence, was not endangered. See also *Monk v PC Harrington Ltd* [2008] EWHC 1879 (QB), [2009] PIQR P52, [2008] All ER (D) 20 (Aug) (rescuer in construction accident not endangered).

5 The liability of a defendant responsible for an accident which results in the victim developing a depressive illness may include liability for the victim's subsequent suicide: *Corr (adminstratrix of Corr deceased) v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884, [2008] 2 All ER 943.

6 *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, [1999] 1 All ER 1, HL.

7 *Page v Smith* [1996] AC 155, [1995] 2 All ER 736, HL, where the plaintiff who was involved in a relatively minor road accident caused by the defendant's negligent driving was not physically injured but suffered from a reoccurrence of myalgic encephalomyelitis ('ME') brought on by the shock of the accident. It was held that he could recover damages as it was reasonably foreseeable that he might suffer personal injury whether physical or psychiatric. Giving the leading judgment, Lord Lloyd of Berwick reasoned that as the plaintiff would have recovered damages had the psychiatric illness been consequential upon a foreseeable physical injury, the fortuitous absence of physical injury should not make any difference.

8 '[T]he test of liability for shock is foreseeability of injury by shock': *King v Phillips* [1953] 1 QB 429 at 441, [1953] 1 All ER 617 at 623, CA, per Denning LJ. The defendant negligently reversed his taxi onto a tricycle being ridden by the plaintiff's son, but it was held that no duty was owed to the plaintiff who heard her son scream and saw the tricycle under the taxi from her home 70 yards away. See, however, *Brice v Brown* [1984] 1 All ER 997, where the plaintiff, who had an underlying personality disorder, did recover for shock and ensuing mental illness from witnessing her daughter being badly cut in a road accident as it was reasonably foreseeable that a mother of a normally robust constitution would have suffered some psychiatric damage at the sight of the accident. In *Group B Plaintiffs v Medical Research Council* (1997) 41 BMLR 157 a special therapeutic trial resulted in a risk to patients of developing Creutzfeldt-Jakob Disease ('CJD'); it was held to be reasonably foreseeable that a person of normal fortitude would suffer psychiatric illness from fear of knowing he could develop CJD. See also *Jaensch v Coffey* (1984) 54 ALR 417; *McFarlane v E E Caledonia Ltd* [1994] 2 All ER 1, [1994] 1 Lloyd's Rep 16, CA; and *Hegarty v E E Caledonia Ltd* [1996] 1 Lloyd's Rep 413.

9 See *McLoughlin v O'Brian* [1983] 1 AC 410 at 422, [1982] 2 All ER 298 at 304, HL, per Lord Wilberforce; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL; applied in *White v Chief Constable of the South Yorkshire Police* [1999] 2 AC 455, [1999] 1 All ER 1, HL (mere fact that claimant's relationship with the tortfeasor is that of employee and employer cannot make him a primary victim). See also *Greatorex v Greatorex (Pope, Pt 20 defendant)* [2000] 4 All ER 769, [2000] 1 WLR 1970 (policy considerations relating to the family held to prevent father from suing son for psychiatric illness caused by seeing the latter's self-inflicted injuries). See generally *Liability for Psychiatric Illness* (Law Com no 249) (1998) which recommends the continuance of special limitations on recovery, the abandonment of the requirement that psychiatric illness be shock-induced, and the enactment of legislation to clarify the law.

10 *Boardman v Sanderson* [1964] 1 WLR 1317, CA (hearing child's screams); *Hambrook v Stokes Bros* [1925] 1 KB 141, CA (seeing lorry running out of control towards child).

11 *Ravenscroft v Rederiaktiebølaget Transatlantic* [1992] 2 All ER 470n, CA; reversing *Ravenscroft v Rederiaktiebølaget Transatlantic* [1991] 3 All ER 73 (mother suffered shock as a result of being told by her husband of the circumstances of her son's death). Although liability was imposed at first instance it was subsequently denied by the Court of Appeal in the light of the 'own senses' requirement reiterated in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL. See also *Hunter v British Coal Corpn* [1999] QB 140, [1998] 2 All ER 97, CA, in which a plaintiff who believed that he had been the involuntary cause of a colleague's death was unable to recover damages for nervous shock suffered on subsequently hearing of the accident from a third party, because of insufficient temporal and physical proximity.

12 *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL. Lord Ackner and Lord Oliver of Aylmerton envisaged extreme situations in which shock suffered through watching television might be recoverable: see *Alcock v Chief Constable of South Yorkshire Police* at 405 and 921, and at 417 and 931.

13 *McLoughlin v O'Brian* [1983] 1 AC 410, [1982] 2 All ER 298, HL, where victims were seen in hospital immediately after the accident so that the shock formed part of the accident as an entire event. See also

Vernon v Bosley (No 1) [1997] 1 All ER 577, (1996) 35 BMLR 135, CA, where the plaintiff watched police attempts to recover from the river the car in which his daughters had drowned. However, there was no recovery in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, [1991] 4 All ER 907, HL, where a corpse was identified in the mortuary nine hours after the event.

14 In *Attia v British Gas plc* [1988] QB 304, [1987] 3 All ER 455, CA, it was held that the duty could extend to shock resulting from the endangering of property. The defendant had negligently allowed a fire to destroy the plaintiff's home and the plaintiff had suffered nervous shock on returning home and witnessing the blaze. Other possible examples include the case where 'the scholar's life's work of research or composition were destroyed before his eyes as a result of the defendant's careless conduct' (per Bingham LJ at 320 and 464).

15 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 397, [1991] 4 All ER 907 at 914, HL, per Lord Keith of Kinkel, and at 403 and 919 per Lord Ackner. On the facts it was held that there was insufficient evidence to show that the brother and brother-in-law, who had personally witnessed the events, had a sufficiently strong tie with the relative who was a victim of the football stadium disaster.

16 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 397, [1991] 4 All ER 907 at 914, HL, per Lord Keith of Kinkel, and at 403 and 919 per Lord Ackner, and at 416 and 930 per Lord Oliver of Aylmerton. See also *Owens v Liverpool Corpn* [1939] 1 KB 394, [1938] 4 All ER 727, CA (which lent some support to recovery by a bystander where mourners at a funeral were shocked when the coffin was over-turned by the defendant's negligence); disapproved in *Hay (or Bourhill) v Young* [1943] AC 92, [1942] 2 All ER 396, HL (bystander witnessing the after effects of a shocking road accident was held unable to recover). As to the subjective nature of reactions to horrific events see *McFarlane v E E Caledonia Ltd* [1994] 2 All ER 1 at 14, [1994] 1 Lloyd's Rep 16 at 25-26, CA, per Stuart-Smith LJ.

17 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 401, [1991] 4 All ER 907 at 918, HL, per Lord Ackner, and at 406 and 922 per Lord Oliver of Aylmerton. See also *Taylor v Somerset Health Authority* (1993) 16 BMLR 63, [1993] PIQR P262, where the defendant's negligent diagnosis led to the plaintiff's husband dying of heart disease in hospital and the plaintiff suffered shock after identifying his body at the hospital, but her claim failed on the ground that the shock was caused by the death itself rather than by an external traumatic event causing the death; cf *North Glamorgan NHS Trust v Walters* [2002] EWCA Civ 1792, [2003] Lloyd's Rep Med 49, [2003] PIQR P232 (36-hour period from when a baby suffered symptoms of a disease until he died constituted a single event which gave rise to a sudden appreciation on the part of his mother allowing recovery for nervous shock).

18 See *W v Essex County Council* [2001] 2 AC 592, [2000] 2 All ER 237, HL (foster parents could pursue claim for psychiatric damage against local authority after placement with them of known sexual abuser who subsequently abused children of family).

19 *Hinz v Berry* [1970] 2 QB 40, [1970] 1 All ER 1074, CA. See also *McLoughlin v O'Brian* [1983] 1 AC 410 at 418, [1982] 2 All ER 298 at 301, HL, per Lord Wilberforce; and *Kirkham v Boughey* [1958] 2 QB 338, [1957] 3 All ER 153, where the plaintiff failed to recover damages for a reduction in his earnings due to declining remunerative employment abroad because of anxiety for his injured wife. But note *Vernon v Bosley (No 1)* [1997] 1 All ER 577, (1996) 35 BMLR 135, CA, where although the plaintiff's grief following the death of his daughters in an accident caused by the defendant's negligence was not an actionable head of damages, he could recover for mental illness which was in part a pathological grief reaction but to which witnessing the aftermath of the accident had also contributed. See also *Calascione v Dixon* (1993) 19 BMLR 97, CA (court entitled to separate elements of plaintiff's psychiatric state into post-traumatic stress disorder and pathological grief disorder and make an award of damages for the former condition only).

13. Pure economic loss.

Pure economic loss refers to financial loss suffered by a claimant which does not flow from any damage to his own person or property[1]. Rather, the loss is caused through a web of economic relationships in which the claimant is involved. The preplanned nature of these relationships frequently provides the claimant with an opportunity to seek protection through such measures as contract[2] and insurance[3]. The interlocking nature of the relationships means that the consequences of a single act of negligence may cause financial loss to numerous individuals.

For both these reasons, recovery for economic loss has not generally been allowed however foreseeable it may have been[4]. Thus where a defendant negligently damages property belonging to a third party, a claimant who suffers economic loss through dependence on that property[5], or a relationship with its owner[6], will not be able to recover unless he too has an interest in the property[7] or, possibly, in the venture in which the third party is involved[8]. Generally, courts will only allow recovery for pure economic loss where it can be said that the defendant has assumed a responsibility to the claimant[9] (although this is not an invariable rule[10]) and that the imposition of a duty would be fair (that is it would provide the claimant with adequate protection without undermining other legal principles[11] or remedies[12]). Thus a solicitor who negligently fails to give effect to his client's testamentary intentions may be liable to a disappointed beneficiary on the grounds that the purpose of his service was to provide a benefit to the claimant and the claimant has no other effective remedy[13]. An employer who negligently provides another employer with an inaccurate reference concerning an ex-employee, may be liable to that ex-employee for his loss of job prospects[14]. In both examples the defendant has a responsibility to the claimant and imposition of a duty would be fair. There are other exceptional cases where it may be said that the defendant has a responsibility to the claimant in the performance of his service[15]. But it would not be fair or reasonable to impose a duty of care on a bank in favour of a third party which had obtained a freezing order against one of its customers[16]. The existence of a contractual relationship between the defendant and claimant will tend to support the imposition of a tortious duty unless the terms of the contract exclude or are inconsistent with such a duty[17]. Similarly, the general contractual context of the relationship, for example with the parties indirectly linked through a chain of contracts, will only preclude a duty of care if such a duty would be inconsistent with the contractual structure, for instance by cutting across the contractual allocation of risks[18] or planned remedial structure[19].

1 Where economic loss results from damage negligently caused to the claimant's own property, it is recoverable as a measure of that physical damage: see eg *Harris v Hall* (1992) Independent, 18 August, CA, where a landlord recovered loss of rental following physical damage to his property caused by the defendant's negligence.

2 As to the law of contract see **CONTRACT**.

3 As to insurance law see **INSURANCE**.

4 See *Murphy v Brentwood District Council* [1991] 1 AC 398 at 486-487, [1990] 2 All ER 908 at 934, HL, per Lord Oliver of Aylmerton. See also *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, (2002) 189 ALR 510 (no duty of care for economic loss where gaming club cashed cheques for gambler).

5 See *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, [1972] 3 All ER 557, CA (plaintiff dependent upon power supply line owned by third party; no recovery for loss of manufacturing profits following damage to the line by the negligent defendant); *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205; *SCM (United Kingdom) Ltd v W J Whittall & Son Ltd* [1971] 1 QB 337, [1970] 3 All ER 245, CA. See also *Londonwaste v Amec Civil Engineering* (1997) 83 BLR 136.

6 See *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Simpson & Co v Thompson* (1877) 3 App Cas 279, HL (underwriters who had paid the insurance due on a ship lost after a collision had no independent right of action against the owner of the ship responsible for the collision because they did not own the chattel which had been damaged); *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243 (defendants who negligently sank a vessel being towed could not be liable to the tug for its loss of profit on the towing contract); *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, [1965] 3 All ER 560 (plaintiff cattle auctioneers, whose business was dependent upon the ability of third parties to bring their cattle to market, were unable to recover from the defendants the profits lost owing to the closure of the markets following an outbreak of foot and mouth disease allegedly caused by the defendants' negligence); *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, sub nom *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru* [1985] 2 All ER 935, PC (time charterer of a vessel could not sue for the profit it would have made during the period that the vessel was under repair following a collision caused by the defendant's negligence); *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785, [1986] 2 All ER 145, HL (defendant who negligently damaged cargo not liable to purchaser of cargo who bore risk of damage but was not yet the owner).

7 See *State of Louisiana v M/V 'Testbank'* 752 F2d 1019 (1985) (in the USA, commercial fishermen succeeded in their claims for damages following a toxic chemical spillage after a collision between two vessels, on the ground that they possessed a proprietary interest in fish in waters they normally harvested).

8 See *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265, HL (plaintiff, who was the owner of undamaged cargo on a ship, had to pay a general average contribution to the costs of damage to other cargo caused by the defendant's negligence, but it was allowed to recover the contribution from the defendant); distinguished as relating specifically to joint ventures at sea in *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL. *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* above was also cited, distinguished and explained in *Londonwaste v Amec Civil Engineering* (1997) 83 BLR 136. However, the Supreme Court of Canada has developed the joint venture exception to allow recovery: see *Canadian National Rly Co v Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289, Can SC (defendant negligently damaged a railway bridge owned by a third party with the result that the plaintiff suffered economic loss from having to re-route its trains); cf *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* (1995) 126 DLR (4th) 1, Nfld CA (damaged oil rig; corporate affiliation did not constitute joint venture).

9 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 180-181, [1994] 3 All ER 506 at 520-521, HL, per Lord Goff of Chieveley; *Spring v Guardian Assurance plc* [1995] 2 AC 296 at 318, [1994] 3 All ER 129 at 145, HL, per Lord Goff of Chieveley; *White v Jones* [1995] 2 AC 207 at 268-269, [1995] 1 All ER 691 at 710-711, HL, per Lord Goff of Chieveley, and at 273-274 and 715-716 per Lord Browne-Wilkinson. See also *Aneco Reinsurance Underwriting Ltd (in liquidation) v Johnson & Higgins Ltd* [2001] UKHL 51, [2001] 2 All ER (Comm) 929, [2002] 1 Lloyd's Rep 157 (liability of insurance broker for negligent advice).

10 See *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256, especially at [51]-[52] (per Lord Rodger of Earlsferry).

11 Eg where the rights and duties of the parties have been clearly defined by equity (*Downsview Nominees Ltd v First City Corpn Ltd* [1993] AC 295, [1993] 3 All ER 626, PC), statute (*Deloitte Haskins and Sells v National Mutual Life Nominees Ltd* [1993] AC 774, [1993] 2 All ER 1015, PC), other tort actions (*CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, [1988] 2 All ER 484, HL (breach of copyright)), or the corporate veil principle of company law (*Verderame v Commercial Union Assurance Co plc* [1992] BCLC 793, CA). See also *Harris v Evans* [1998] 3 All ER 522, [1998] 1 WLR 1285, CA (a health and safety inspector who advises a local authority to issue an improvement or prohibition notice on an individual cannot be held liable in negligence for economic loss suffered, as the rights of the parties are governed by the Health and Safety at Work etc Act 1974).

12 Eg judicial review (*Rowling v Takaro Properties Ltd* [1988] AC 473, [1988] 1 All ER 163, PC), or statutory remedies (*Jones v Department of Employment* [1989] QB 1, [1988] 1 All ER 725, CA (social security appeal process); *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL).

13 *White v Jones* [1995] 2 AC 207, [1995] 1 All ER 691, HL; *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580. In *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161, [1996] 1 WLR 1397, CA, it was held that this principle could not be applied by analogy to the case where the defendant was alleged to have wrongly advised a man that his vasectomy operation was successful with the result that he inadvertently fathered the plaintiff's child thereby causing her financial loss. In *Anthony v Wright* [1995] 1 BCLC 236, (1994) Independent, 27 September, it was held that the principle could not be extended to the relationship of auditor and the investors or beneficiaries of the trust company being audited, as the company or its liquidator had an effective remedy against the auditor. However, the remedy extended to a disappointed beneficiary in *White v Jones* above can be extended to cases in which the estate does have a remedy, but that remedy is of no advantage to the disappointed beneficiary: *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326, [1998] 4 All ER 225, CA.

14 *Spring v Guardian Assurance plc* [1995] 2 AC 296, [1994] 3 All ER 129, HL. In the light of this case there may be doubts about the decision in *Petch v Customs and Excise Comrs* [1993] ICR 789, CA (no duty of care in relation to pension reference). As to other cases of negligent references or reports see *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223, [1970] 1 All ER 1009, CA (plaintiff's charge over land lost when defendant registry negligently provided purchaser with a clear certificate); and *Johnstone v Traffic Comr* 1990 SLT 409, Ct of Sess (medical adviser might owe a duty of care to the plaintiff where the adviser's erroneous diagnosis led to the plaintiff's loss of driving licence). But see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, NZ CA, where it was held that an investigator, reporting the causes of a fire to an insurance company, did not owe a duty to the insured whose claim was rejected because of the allegedly inaccurate report as the insured had an adequate contractual remedy against the insurer and a limited remedy in defamation against the investigator.

15 See *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 Lloyd's Rep 7, CA (duty owed by broker to identified assignee of policy); *Aiken v Stewart Wrightson Members' Agency Ltd* [1995] 3 All ER 449, [1995] 1 WLR 1281 (on appeal [1996] 2 Lloyd's Rep 577, CA) (duty owed by Lloyd's managing agent to future names); *Penn v Bristol and West Building Society* [1996] 2 FCR 729, [1995] 2 FLR 938 (solicitor who was instructed by a husband to act in the sale of a house and who failed to ascertain whether the wife had given

authority, was liable to the wife); *Knight v Lawrence* [1993] BCLC 215, [1991] 1 EGLR 143 (receiver owed duty to mortgagor in relation to power to issue rent review notices); *Bishop v Bonham* [1988] 1 WLR 742, [1988] BCLC 656, CA (mortgagee liable to mortgagor for selling shares at undervalue).

16 *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256.

17 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 194-195, [1994] 3 All ER 506 at 532, 534, HL, per Lord Goff of Chieveley; followed in *Holt v Payne Skillington* (1995) 77 BLR 51, (1995) Times, 22 December, CA, where it was held that a tortious duty may be wider in scope than the contractual duties between the parties. However, in *Aiken v Stewart Wrightson Members' Agency Ltd* [1995] 3 All ER 449, [1995] 1 WLR 1281 (on appeal [1996] 2 Lloyd's Rep 577, CA), members' agents did not owe a non-delegable tortious duty of care to names in relation to decisions taken by the managing agents despite the fact that such a duty would be owed in contract.

18 See *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA; *Southern Water Authority v Carey* [1985] 2 All ER 1077; and *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71, [1988] 2 All ER 971, CA.

19 See *Pacific Associates Inc v Baxter* [1990] 1 QB 993, [1989] 2 All ER 159, CA.

UPDATE

13 Pure economic loss

NOTE 6--See *Shell UK Ltd v Total UK Ltd; Total UK Ltd v Chevron Ltd* [2010] EWCA Civ 180, (2010) Times, 30 March.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE/(1) NATURE OF NEGLIGENCE/(ii) Duty of Care: Particular Problems/14. Negligent statements.

14. Negligent statements.

Where a defendant makes a statement which is reasonably relied upon by a claimant in the way intended by the defendant, there may be an assumption of responsibility sufficient to give rise to liability for economic loss flowing from the reliance[1]. It is not necessary that the statement be made directly to the claimant; communication through an intermediary is sufficient[2]. However, it is necessary that the defendant knows that his statement will be communicated to the claimant either specifically or as a member of an ascertainable class[3], and that the statement is likely to be acted upon by the claimant for the purpose for which the statement was made[4] and that such was objectively the intention of the defendant[5]. That purpose may be clear from the terms in which it is requested[6] or required[7], but it may also be implied from the circumstances. Thus the purpose of a surveyor's report to a building society is not only to enable the society to meet the statutory requirement for the property to be valued but also to inform the purchaser, for it is common practice for such valuations to be passed to, and relied upon by, the purchaser[8]. Similarly, it may be implied that a financial statement, expressly directed to company shareholders, is also intended to influence those bidding for the company[9], or that a prospectus issued to support the flotation of shares was also intended to influence those subsequently purchasing the shares on the stock market[10]. However, the fact that the claimant notified the defendant of the purpose for which he wished to rely on the statement will not support a finding that the statement was intended for that purpose[11], unless the defendant acknowledged that the notified use now constituted one of the purposes for which it was supplied[12]. The claimant's reliance on the statement must be reasonable in order to give rise to a duty[13]. The nature of the relationship between the parties, for example its commercial context[14] or informal nature[15], may suggest that reliance is not reasonable. The specific circumstances may suggest that the claimant should have verified the information

before placing reasonable reliance upon it[16]; but the fact that the statement is one of opinion[17], or even as to future policy[18], does not preclude reasonable reliance provided the maker of the statement presented himself as having the requisite knowledge or authority. Where the claimant's reliance on a negligent statement leads to foreseeable physical damage, the defendant will be liable provided that there is sufficient proximity and that the imposition of a duty would be fair and reasonable[19].

1 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL, where the plaintiffs asked their bankers to inquire into the financial stability of a company with which they were having business dealings. The bankers made inquiries of the company's bankers, the defendants, who carelessly gave favourable references about the company. Reliance on those references caused the plaintiffs loss. An action based on those careless statements failed solely because the defendants had expressly disclaimed any responsibility. As to the effect of the Unfair Contract Terms Act 1977 on disclaimers see PARA 74.

2 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL.

3 See *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648, [1997] PNLR 618, CA (the foreseeability of information being relied upon by persons other than those for whom it was provided does not render such persons part of an ascertainable class).

4 *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL.

5 'Such intent is objectively established if the representor expressly communicates intent to the representee . . . [W]here it is not expressly communicated, the representee must establish that he reasonably relied on the representation and that he reasonably believed that the representor intended him to act upon it. Accordingly, if the subjective intention of the representor is not expressly communicated to him, the existence of a subjective intention alone is insufficient to found an action unless the existence of such an intention on the part of the representor was reasonably to be inferred by the representee': *Possfund Custodian Trustee Ltd v Diamond (McGrigor Donald (a firm), third party)* [1996] 2 All ER 774 at 786-787 per Lightman J. See also *Hagen v ICI Chemicals and Polymers Ltd* [2002] Lloyd's Rep PN 288, [2002] IRLR 31 (employer persuading employees to accept transfer by stating new employer's pension scheme was comparable to its pension scheme).

6 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL.

7 In *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568, HL, the court determined the purpose of the audit statement by examining the nature of the statutory audit requirement. See also *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648, [1997] PNLR 618, CA, in which the purpose of Department of Transport certification of seaworthiness was determined by examination of the authorising statute.

8 *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL. See also *Beaumont v Humberts* [1988] 2 EGLR 171, [1988] 29 EG 104 (on appeal [1990] 2 EGLR 166, [1990] 49 EG 46, CA) (surveyor valuing for mortgage purposes owed no duty to purchaser who relied on valuation for fire insurance purposes); *Beresforde v Chesterfield Borough Council* [1989] 2 EGLR 149, [1989] 39 EG 176, CA (building society liable to purchaser for presenting valuation report as its own); *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985, [2004] 1 All ER (Comm) 193 (inspection certificate issued by a company instructed by the seller, in respect of false bill of lading, gives rise to liability to the purchaser as the party most likely to be affected by any negligent misstatement contained in it).

9 See *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, sub nom *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA.

10 See *Possfund Custodian Trustee Ltd v Diamond (McGrigor Donald (a firm), third party)* [1996] 2 All ER 774, [1996] 1 WLR 1351; doubting *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321, [1990] 1 WLR 1390. Cf *Abbott v Strong* [1998] 2 BCLC 420 (an accountancy firm, engaged by company directors to help in the preparation of a share prospectus, will not owe a duty of care to third party shareholders for negligent misstatements which appear in the prospectus); and *Precis (521) plc v William M Mercer Ltd* [2005] EWCA Civ 114, [2005] PNLR 511, [2005] All ER (D) 206 (Feb) (valuers did not assume responsibility to third party investors in relation to preparation of valuation report on company's pension fund).

11 See *Lowe Lippmann Figdor & Franck v AGC (Advances) Ltd* [1992] 2 VR 671, Vict SC, where a creditor relied on an inaccurate audit report of a company to review its credit facility. It was held that there would only be liability if the audit report itself was made with the intention of inducing the creditor to extend further credit.

12 See *Kripps v Touche Ross & Co* (1992) 94 DLR (4th) 284, BC CA, where accountants allegedly consented to their opinions in audit statements being included in debenture prospectuses subsequently distributed by

their client. On the basis that the allegation was true, the court held that a duty would be owed to those who invested on the basis of the prospectus.

13 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486, [1963] 2 All ER 575 at 583, HL, per Lord Reid; *James McNaughton Papers Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 at 126-128, [1991] 1 All ER 134 at 145-146, CA, per Neill LJ. See also *Lambert v West Devon Borough Council* [1997] 1 PLR 103 (plaintiff entitled to rely upon the negligent statement of a senior officer of the local authority that he could continue with building works, although the grant of planning permission was outside the competence of the local authority).

14 Thus where an insurance company gave investment advice to a policyholder, it was held that no duty arose as the company had no commercial expertise in that form of advice: *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793, [1971] 1 All ER 150, PC. The overall nature of the commercial relationship was considered relevant by Hoffmann J at first instance in *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295 at 302, sub nom *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1990] 3 All ER 330 at 335 (on appeal sub nom *Morgan Crucible Co plc v Hill Samuel & Co Ltd* [1991] Ch 295, sub nom *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148, CA). See also *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261, Can SC, where the employee's lack of financial resources and opportunity to decline the risk were taken into account when concluding that reliance on an ordinary employee would rarely if ever be reasonable in the absence of an express or implied undertaking of responsibility by the employee: see further PARA 16.

15 *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA (a company chartering barges was not liable in negligence when one of their employees misrepresented the capacity of a barge in an unconsidered oral response to an inquiry). But see also *Chaudhry v Prabhakar* [1988] 3 All ER 718, [1989] 1 WLR 29, CA, in which a duty was somewhat doubtfully conceded in the context of a social relationship in which one party advised the other on the purchase of a car.

16 See *James McNaughton Papers Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113 at 128, [1991] 1 All ER 134 at 146, CA, per Neill LJ (where it was said that in a transaction between experienced business men it was to be anticipated that the plaintiff would consult his own accountancy advisers). See also *Patchett v Swimming Pool & Allied Trades Association Ltd* [2009] EWCA Civ 717, [2009] All ER (D) 152 (Jul) (no liability for misleading statement on defendant's website since claimants should have consulted defendant's information pack for fuller information); *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; and *Tidman v Reading Borough Council* [1994] 3 PLR 72, (1994) Times, 10 November.

17 See eg *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA (petrol company negligently advised a prospective tenant of its petrol station about the likely throughput of petrol); and *Edwards v Lee* [1991] NLJR 1517 (negligent character reference provided by a solicitor to someone giving credit to a client).

18 See eg *Meates v A-G* [1983] NZLR 308, NZ CA (policy statement by government minister); and *Unilan Holdings Pty Ltd v Kerin* (1992) 107 ALR 709 (policy statement by government minister).

19 *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, sub nom *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1995] 3 All ER 307, HL. See also *Clayton v Woodman & Son (Builders) Ltd* [1962] 2 QB 533, [1961] 3 All ER 249, where an architect was liable to a bricklayer for careless statements about how to carry on building work which resulted in harm to the bricklayer who relied on those statements; revsd on another point [1962] 2 All ER 33, [1962] 1 WLR 585, CA.

15. Defective products or buildings.

A person who unknowingly acquires a product or building which is defective may suffer loss in repairing or replacing it when the defect is discovered. For a period it was considered that where the defect was dangerous, the repair or replacement loss should be treated as equivalent to physical damage on the ground that it was necessary to avoid the possibility of damage being caused by the defect[1]. Hence a defendant responsible for such a defect might be held liable on the basis of foreseeability and proximity alone[2]. However, this treatment of dangerous defects as being equivalent to physical damage has now been rejected in favour of

the view that repair or replacement loss is purely economic[3]. Only where the defect has caused damage to another item of property can liability be based on the less stringent requirements appropriate to physical damage[4]. However, this analysis cannot be extended to treat buildings as complex structures in which defective foundations, for example, can be treated as a distinct item of property able to damage another item such as the superstructure of the building[5].

Where the loss is purely economic, a contractor will only be liable in tort where he has assumed a responsibility to the acquirer or user of the defective building[6]. It seems unlikely that the requisite assumption of responsibility can be found where the defendant is not exercising a special skill[7], or where the claimant was not identifiable at the time the work was done[8].

In policy terms, an important justification for refusing to treat building repair costs as equivalent to physical damage and recoverable more widely, is the fact that those acquiring an interest in defective property may have a remedy under the provisions of the Defective Premises Act 1972[9].

1 See eg *Dutton v Bognor Regis UDC* [1972] 1 QB 373, sub nom *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, CA (now overruled by *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL).

2 See *Dutton v Bognor Regis UDC* [1972] 1 QB 373, sub nom *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, CA (a local authority whose building inspector negligently and erroneously certified that a new house complied with its foundations byelaws, was held liable to a subsequent buyer of the house for the damage caused two years later by subsidence); approved in *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL. Both these cases have now been overruled by *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL.

3 'If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic': *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 at 206, [1988] 2 All ER 992 at 1006, HL, per Lord Bridge of Harwich. See also *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL (overruling *Dutton v Bognor Regis UDC* [1972] 1 QB 373, sub nom *Dutton v Bognor Regis United Building Co Ltd* [1972] 1 All ER 462, CA; and *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL). Thus in *Hamble Fisheries Ltd v L Gardner & Sons Ltd, The Rebecca Elaine* [1998] All ER (D) 704, CA, the defendant was not liable for economic loss caused by a defective engine in the absence of a contractual or special relationship, notwithstanding that the defendant knew of the defect but failed to warn the plaintiff. However, in *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 All ER 756, PC, it was held that the New Zealand Court of Appeal was entitled to develop the common law according to local policy considerations and was free to reject the approach taken by the House of Lords in *D & F Estates Ltd v Church Comrs for England* above and *Murphy v Brentwood District Council* above. See also the rejection of *Murphy v Brentwood District Council* above by the High Court of Australia and the Supreme Court of Canada respectively in *Bryan v Maloney* (1995) 128 ALR 163, Aust HC; and *Winnipeg Condominium Corpn No 36 v Bird Construction Co Ltd* (1995) 121 DLR (4th) 193, Can SC. *Bryan v Maloney* above was itself subsequently doubted by the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, 101 ConLR 113, in which it was held that a builder of commercial premises owes no duty to a subsequent purchaser of the premises to avoid reasonably foreseeable losses.

4 Eg a defective central heating boiler exploding and damaging a house (the example given in *Murphy v Brentwood District Council* [1991] 1 AC 398 at 478, [1990] 2 All ER 908 at 928, HL, per Lord Bridge of Harwich).

5 See *Murphy v Brentwood District Council* [1991] 1 AC 398 at 478, [1990] 2 All ER 908 at 928, HL, per Lord Bridge of Harwich, and at 484 and 932 per Lord Oliver of Aylmerton, criticising Lord Oliver of Aylmerton's earlier approach in *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 at 212, [1988] 2 All ER 992 at 1010, HL, that a 'complex structure theory' could explain decisions such as *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL. See also *Warner v Basildon Development Corpn* (1990) 7 Const LJ 146 at 153-155, CA, per Ralph Gibson LJ. The same point applies to products: see *Aswan Engineering Establishment Co v Lupdine Ltd (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135, [1987] 1 WLR 1, CA.

6 Thus a subcontractor nominated for his special skill has been held liable for the cost of replacing his defective workmanship suffered by the building owner: *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, [1982] 3 All ER 201, HL. Giving the leading speech, Lord Roskill justified the duty on the basis of the two stage test in *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, HL. In the light of the subsequent criticism of this test, it is preferable to accept the explanation given by Goff LJ in *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507 at 527-528, [1985] 3 All ER 705 at 715, CA, that liability rested on assumption of responsibility. See also Lord Goff of Chieveley's similar analysis in *Henderson v Merrett*

Syndicates Ltd [1995] 2 AC 145, [1994] 3 All ER 506, HL. The liability of the architect to the known intended user of the defective building in *Portsea Island Mutual Co-operative Society Ltd v Michael Brashier Associates* (1989) 6 Const LJ 63, (1990) 6 PN 43, may also be explained on this basis. As to the duty of an architect to a client see further *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm)* [1993] 3 All ER 467; and *Wessex Regional Health Authority v HLM Design* (1994) 10 Const LJ 165.

7 Eg where he is a mere manufacturer: see *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854, [1992] 1 WLR 498.

8 See *Preston v Torfaen Borough Council* (1993) 26 HLR 149, 65 BLR 1, CA. See also *Strathford East Kilbride Ltd v HLM Design Ltd* 1999 SLT 121, OH (architects owed no duty of care to tenants of persons for whom they had carried out architectural services to avoid causing them financial loss, in absence of evidence showing that they had assumed responsibility towards such persons).

9 As to the Defective Premises Act 1972 see PARAS 43-44; and **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 77-79.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE/(1) NATURE OF NEGLIGENCE/(ii) Duty of Care: Particular Problems/16. Personal liability of employees and directors.

16. Personal liability of employees and directors.

It is generally accepted that an employee owes a duty of care in relation to physical damage to those who may foreseeably be affected by his conduct, including those contracting with his employer as fellow employees or customers[1]. On the ground that the law cannot be more favourable to company directors than it is to employees, it has been held that a director must be personally liable where his negligent conduct leads to foreseeable physical damage[2]. Where the negligence of the employee or director results in pure economic loss, personal liability will depend upon whether there has been a personal assumption of responsibility[3]. Save in exceptional circumstances[4], it is likely that the employer rather than the employee will be found to have assumed the responsibility to a client[5]; and even where an employee has assumed responsibility personally, the employer may still be vicariously liable[6]. For directors to incur personal liability, however, the court must be satisfied objectively that it was reasonable for the claimant to rely on the director's assumption of responsibility, so as to create a special relationship between him and the claimant[7].

1 The vicarious liability of the employer is said to rest on the personal liability of the employee: see *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL, where an employer successfully claimed an indemnity against a negligent employee in respect of its vicarious liability to the fellow employee who was injured. See, however, *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261, Can SC, where the notion that the employer's liability (eg to a customer) presupposed the personal liability of the negligent employee was criticised on the ground that such personal liability would be unfair given the employee's lack of opportunity to decline the risk and financial resources to meet it.

As to an employer's duty of care to his employee see **EMPLOYMENT** vol 39 (2009) PARA 32 et seq.

2 See *Fairline Shipping Corpn v Adamson* [1975] QB 180, [1974] 2 All ER 967; *Ambler v Hepworth* (2 June 1992, unreported), QBD.

3 As to pure economic loss see PARA 13.

4 See eg *Punjab National Bank v de Boinville* [1992] 3 All ER 104, [1992] 1 Lloyd's Rep 7, CA, where insurance brokers, although employees of a brokerage, worked very much on their own.

5 Eg a local authority surveyor, whose negligent valuation was relied upon by purchasers taking a mortgage from the authority, could not owe a duty to the purchasers because due to his position as the authority's servant the surveyor was given no opportunity to decide whether or not he wanted to assume a duty of care towards the purchasers: see *Harris v Wyre Forest District Council* [1988] QB 835, [1988] 1 All ER 691, CA; on appeal sub nom *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL. In *Ministry of Housing and Local*

Government v Sharp [1970] 2 QB 223, [1970] 1 All ER 1009, CA, the Court of Appeal divided on whether a local authority employee was personally liable for economic loss. See also *Edgeworth Constructions Ltd v N D Lea & Associates Ltd (Pacific Coast Energy Corpn intervening)* (1993) 107 DLR (4th) 169, Can SC (although the employer, an engineering firm, owed a duty of care in relation to negligent statements, the individual engineer issuing the faulty information did not owe a duty).

6 See *European International Reinsurance Co Ltd v Curzon Insurance Ltd* [2003] EWCA Civ 1074, [2003] Lloyd's Rep IR 793, [2003] All ER (D) 364 (Jul).

7 See *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL. See also *Nordic Oil Services Ltd v Berman* 1993 SLT 1164, Ct of Sess (directors owed no duty to company creditors).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE/(1) NATURE OF NEGLIGENCE/(ii) Duty of Care: Particular Problems/17. Public services implementing statutory duties.

17. Public services implementing statutory duties.

Where a public body has acted in a negligent manner when implementing its statutory duties or decisions taken under its statutory powers, it may owe a duty of care based on the normal principles of foreseeability, proximity and justice and reasonableness[1]. In some situations a duty may be denied on the grounds of lack of proximity or unreasonableness. Thus it has been held that the police do not owe a duty to the public in relation to the manner in which they carry out their duty to investigate crime[2], or maintain public order[3] and highway safety[4]. This denial of duty has been based partly on the lack of proximity between the police and the individual members of the public suffering damage as a consequence of the alleged negligence[5], and partly on the undesirability of imposing a duty which might lead the police to carry out their function in a detrimentally defensive frame of mind[6], or might lead to a significant diversion of resources from policing to litigation[7]. Similar considerations may lead to a denial of duty in relation to other public services[8]. However, such considerations may be displaced where there has been an assumption of responsibility to the claimant[9], or a breach of specific instructions by the defendant[10]. The statutory framework within which the service is provided is another important factor in determining the reasonableness of a duty[11], and the existence of alternative remedies may weigh against the imposition of a common law duty of care[12].

1 See eg *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93, HL (public body carrying out construction work); *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL (education authority giving advice to parents and pupils); *Vicar of Writtle v Essex County Council* (1979) 77 LGR 656 (social worker implementing a decision to place a child with propensity for fire raising in a community home); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 All ER 294, HL (prison officers failing to carrying out instructions in relation to the supervision of detainees); *Duff v Highlands and Islands Fire Board* 1995 SLT 1362n, Ct of Sess (fire service carrying out its duty to fight fires); *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, [1985] 1 WLR 1242 (police decision to fire a CS gas canister into the plaintiff's property without ensuring that fire fighting equipment was present to deal with the consequence); *A-G of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273, [2004] All ER (D) 372 (Feb) (police authority owes a duty to the public at large to see that any officer entrusted with a gun is a suitable person to be entrusted with such a weapon); *B v A County Council* [2006] EWCA Civ 1388, [2006] 3 FCR 568, [2007] 1 FLR 1189 (local authority may owe duty to adoptive parents to keep their identity confidential). As to the test for determining a notional duty of care see PARA 4.

2 See *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [2008] 3 All ER 977 (no general duty to victims or witnesses); *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238, HL (alleged negligent investigation); *Osman v Ferguson* [1993] 4 All ER 344, CA (alleged negligent failure to arrest known suspect to forestall further offences); *Alexandrou v Oxford* [1993] 4 All ER 328, CA (alleged negligent failure to respond properly to a burglar alarm); *Kinsella v Chief Constable of Nottinghamshire* (1999) Times, 24 August (alleged negligent search of premises).

3 See *Hughes v National Union of Mineworkers* [1991] 4 All ER 278 at 288, [1991] ICR 669 at 680 per May J (decision of a senior officer led to the injury of one of his subordinates at the hands of the pickets; senior police officers not liable to subordinates for on the spot operational decisions).

4 See *Ancell v McDermott* [1993] 4 All ER 355 at 366, [1993] RTR 235 at 244, CA, per Beldam LJ (police under no duty of care to warn road users of a dangerous oil spillage on the road; the existence of such a duty would cause a diversion of police resources and thereby severely hinder the performance of ordinary police duties); *Clough v Bussan (West Yorkshire Police Authority, third party)* [1990] 1 All ER 431 at 435 per Kennedy J (extension of immunity to the police response to a traffic hazard was justified on the ground that this was part of their continuing obligation to preserve law and order and to protect life and property).

5 See *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238, HL; but cf *Desmond v Chief Constable of Nottinghamshire Police* [2009] EWHC 2362 (QB), [2009] All ER (D) 16 (Oct) (possibility that the principle in *Hill v Chief Constable of West Yorkshire* may not apply to the act of collating information).

6 See *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489, [2005] 1 WLR 1495; *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [2008] 3 All ER 977.

7 See *Ancell v McDermott* [1993] 4 All ER 355, [1993] RTR 235, CA.

8 See *OLL v Secretary of State for Transport* [1997] 3 All ER 897 (no duty owed by the coastguard service with respect to rescues at sea): *Mulcahy v Ministry of Defence* [1996] QB 732, [1996] 2 All ER 758, CA (no duty owed by military servicemen operating in battle conditions). As to fire service liability see *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 955, [1996] 3 All ER 801 at 829-830, HL, per Lord Hoffmann.

9 See *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464, [1996] 3 All ER 449, CA (sufficient assumption of responsibility by the police towards the plaintiff; the policy in favour of police immunity from suit in relation to their activities of investigation and suppression of crime could be displaced by other policy considerations such as the protection and encouragement of informants). See also *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193, HL (justiciability of issues arising out of local authority treatment of children in their care); *T (a minor) v Surrey County Council* [1994] 4 All ER 577, sub nom *Harrison v Surrey County Council* [1994] 2 FCR 1269 (liability of local authority to the plaintiff for injuries sustained whilst in care of child minder was based on the authority's assurance child minder was suitable); *W v Essex County Council* [2001] 2 AC 592, [2000] 2 All ER 237, HL (claim that local authority owed foster parents duty of care was not so clearly bad that it ought to be struck out).

10 *Knightley v Johns* [1982] 1 All ER 851, [1982] 1 WLR 349, CA (police inspector liable for negligently ordering a constable to do something dangerous contrary to explicit standing orders, resulting in injury).

11 *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289, [2007] ICR 1469, [2007] All ER (D) 53 (Apr) (statutory body required to take reasonable steps to protect dock workers from asbestos).

12 *Rowling v Takaro Properties Ltd* [1988] AC 473, [1988] 1 All ER 163, PC.

18. Exercise of statutory discretion by public bodies.

Where a public body takes a decision within the ambit of a statutory discretion that decision is not necessarily immune from challenge within the law of negligence[1]. Nevertheless, matters of policy[2] relevant to the exercise of the discretion are not justiciable and the court cannot adjudicate on them[3]. Thus a decision by a regulatory authority to allocate funds to raising the quality rather than the quantity of its activity would be unassailable[4], but a decision as to the timing of a regulatory measure might not be[5]. It has been suggested that whilst decisions as to the level of social work service to be provided would not be justiciable, those concerned with the allocation of social workers and the proper conduct of investigations would be justiciable[6]. If the issue is justiciable, the public body may be subject to a duty of care if the imposition of such a duty would otherwise be appropriate on grounds of proximity and justice[7]. It was once

thought that, in order to be justiciable, a decision had to fall outside the statutory discretion eg by being so unreasonable that there had been no real exercise of the discretion which Parliament had conferred[8]. However, this approach has been superseded by one which asks simply whether the decision was justiciable at all and, if so, whether, assuming the requirements of proximity and foreseeability to be satisfied, it would be fair, just and reasonable to impose a duty of care[9]. It follows that even if the decision is justiciable, a duty of care may still be denied if its imposition would be inappropriate; thus it may not be considered just and reasonable to superimpose a common law duty of care on a statutory regime if it might have the effect of subjecting professional people involved to a conflict of interest[10]. Proximity may be absent on the ground that there was insufficient control[11], or that the purpose of the statutory scheme was to benefit the public as a whole rather than particular individuals[12]. Professionals exercising statutory powers, while employed by public bodies, can render their employers vicariously liable for negligence[13], for example where responsibilities are owed or assumed towards individual members of the public[14]; direct liability may also be appropriate in some cases, provided the decision sought to be impugned was not in substance one of policy[15].

1 See *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 583, [1999] 3 All ER 193 at 222, HL, per Lord Hutton.

2 Ie 'those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks': *Rowling v Takaro Properties Ltd* [1988] AC 473 at 501, [1988] 1 All ER 163 at 172, PC.

3 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 738, [1995] 3 All ER 353 at 371, HL, per Lord Browne-Wilkinson. But the issues arising from a claim for personal injuries incurred as a result of negligent local authority care during childhood are not obviously non-justiciable: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193, HL.

4 Ie the example given in *Just v British Columbia* (1990) 64 DLR (4th) 689, Can SC, per Cory J. Similarly, a decision as to detention regimes which necessarily involves balancing risks to the public against benefits to detainees, would not be justiciable by the courts: see *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1067-1068, [1970] 2 All ER 294 at 332, HL, per Lord Diplock.

5 See *Lonrho plc v Tebbit* [1991] 4 All ER 973 at 981, [1992] BCLC 67 at 75-76 per Browne-Wilkinson V-C; on appeal [1992] 4 All ER 280, [1993] BCLC 96, CA. See also *Larner v Solihull Metropolitan Borough Council* [2001] RTR 469, [2000] All ER (D) 2426, CA (if the only reasonable way in which a local authority may exercise its statutory discretion is to act in a particular way, it may be subject to a common law duty, as well as a statutory duty, to act in that manner).

6 See *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 748-749, [1995] 3 All ER 353 at 380, HL, per Lord Browne-Wilkinson.

7 See eg *Beasley v Buckinghamshire County Council* [1997] PIQR P473 (decision of local authority regarding the placement of a child with a foster parent involved the discretion of the authority but was not a matter of policy and was justiciable).

8 See *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1031, [1970] 2 All ER 294 at 301, HL, per Lord Reid; applied in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL. A distinction was drawn in some cases between policy and operational decisions to determine whether a discretion had been exceeded, and the imposition of a duty of care facilitated. But for criticism of this distinction see *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 951-953, 955-956, [1996] 3 All ER 801 at 826-928, 830, HL, per Lord Hoffmann. See also *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 571-572, [1999] 3 All ER 193 at 211, HL, per Lord Slynn of Hadley.

9 Ie the requirements enunciated in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617-618, [1990] 1 All ER 568 at 573-574: see *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 585-586, [1999] 3 All ER 193 at 224-225, HL, per Lord Hutton; and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at 653, [2000] 4 All ER 504 at 517, HL, per Lord Slynn of Hadley (applied in *Carty v Croydon London Borough Council* [2005] EWCA Civ 19 at [28]-[32], [2005] 2 All ER 517 at [28]-[32], [2005] 1 WLR 2312 at [28]-[32] per Dyson LJ, and at [82] per Mummery LJ).

10 See eg *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, [2005] 2 All ER 443, HL (doctor investigating alleged child abuse owes no duty to the parents, only to the child). See also *D v Bury Metropolitan Borough Council; H v Bury Metropolitan Borough Council* [2006] EWCA Civ 1, [2006] 1 WLR 917, [2006] 2 FLR 147.

11 See *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] AC 718, [1987] 2 All ER 13, HL.

12 See *Yuen Kun Yeu v A-G of Hong Kong* [1988] AC 175, [1987] 2 All ER 705, PC; *Minories Finance Ltd v Arthur Young (a firm) (Bank of England, third party)* [1989] 2 All ER 105; *Davis v Radcliffe* [1990] 2 All ER 536, [1990] 1 WLR 821, PC; *Ashmore v Corpn of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620. The decisions in these cases concerned economic matters. Decisions relating to safety matters may be more likely to give rise to a duty: see eg *Swanson Estate v Canada* (1991) 80 DLR 4th 741, Fed CA (aviation regulator liable for negligent failure to cancel an airline's licence following the discovery of serious safety irregularities).

13 See *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, [2000] 4 All ER 504, HL.

14 See eg *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, [2000] 4 All ER 504, HL; *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, [2005] 2 All ER 517, [2005] 1 WLR 2312.

15 See *Phelps v London Borough of Hillingdon* [2001] 2 AC 619 at 658, [2000] 4 All ER 504 at 522, HL, per Lord Slynn of Hadley; *Carty v Croydon London Borough Council* [2005] EWCA Civ 19 at [36], [2005] 2 All ER 517 at [36], [2005] 1 WLR 2312 at [36] per Dyson LJ.

19. Failure by public bodies to exercise statutory powers.

A public body will not normally be liable for damage caused by a failure to exercise its statutory power[1]. It has been considered that a duty might exist where the failure concerned an operational rather than a policy matter, but this has now been doubted[2]. It is now said that the minimum pre-conditions for such a duty of care are: (1) that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act; and (2) that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised[3].

Failure to exercise the power will be irrational where it has previously been exercised to provide a service as a matter of routine, but arbitrarily withheld on the occasion in question, on the basis that the routine exercise may have created a general expectation in the community that the power would continue to be exercised, and a realisation by the authority that there was a general reliance on its exercise[4]. Exceptional grounds for holding that the policy of the statute requires compensation may include situations where the power was intended to protect members of the public from risks against which they could not guard themselves[5], or they might be found in the general patterns of socio-economic behaviour[6].

1 See *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 102, [1940] 4 All ER 527 at 543, HL, per Lord Romer.

2 See *Anns v Merton London Borough Council* [1978] AC 728 at 754, [1977] 2 All ER 492 at 500, HL, per Lord Wilberforce; doubted in *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 948-953, [1996] 3 All ER 801 at 823-828, HL, per Lord Hoffmann.

3 *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 953, [1996] 3 All ER 801 at 828, HL, per Lord Hoffmann (highway authority not liable for its failure to remove an earth bank, adjacent to a road, which impeded drivers' vision). See also *Hussain v Lancaster City Council* [2000] QB 1, [1999] 4 All ER 125, CA (local authority not liable for failing to bring possession proceedings against tenants causing racial harassment

to nearby property owners); cf *Kane v New Forest District Council* [2001] EWCA Civ 878, [2001] 3 All ER 914, [2002] 1 WLR 312.

4 See *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 953-954, [1996] 3 All ER 801 at 828-829, HL, where Lord Hoffmann distinguished the general reliance argument, which was based on the public nature of the authority's powers, from the specific reliance which might result from a specific representation to an individual where liability would depend upon the same principles as those applicable to private individuals. The application of the doctrine of general reliance 'may require some very careful analysis of the role which the expected exercise of the statutory power plays in community behaviour' (at 954-955 and 829 per Lord Hoffmann).

5 Eg the control of air traffic, which is one of the examples given in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 31, Aust HC, per Mason J.

6 See *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923 at 954, [1996] 3 All ER 801 at 829, HL, per Lord Hoffmann; citing *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 All ER 756, PC.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/1. GENERAL PRINCIPLES OF THE LAW OF NEGLIGENCE/(1) NATURE OF NEGLIGENCE/(ii) Duty of Care: Particular Problems/20. Immunity for participants in legal proceedings.

20. Immunity for participants in legal proceedings.

Judges of superior and inferior courts are immune from negligence liability when acting within jurisdiction[1], and the same principle applies to magistrates[2]. A judge acts within jurisdiction if he has the authority to make the decision in question even if, due to some error of law or procedure, his decision is invalid and may be overturned on appeal or quashed on judicial review[3]. Superior court judges are immune when acting outside jurisdiction but in good faith[4], and legislation has extended the same immunity to magistrates[5].

Judicial immunity extends to those exercising a quasi-judicial function to resolve a formulated dispute where their judgment is based on the submissions of the parties rather than a direct investigation of the facts[6]. Witnesses in legal proceedings have immunity both in relation to evidence given in court and the work principally and proximately leading to it[7]. A civil litigant does not owe a duty to his adversary in relation to the conduct of the proceedings[8] and neither does the Crown Prosecution Service owe a duty of care in relation to those it prosecutes[9].

Advocates, whether barristers or solicitors, no longer enjoy immunity against suits in negligence in respect of their conduct of civil or criminal cases in court as it is no longer considered to be in the public interest to maintain the immunity which advocates formerly enjoyed[10]. The advocate's duty to his own client is, however, subject to his duty to the court, and the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court[11]. Even before its abolition the immunity did not apply to those preparing the case, such as solicitors[12]; nor did it apply to the Crown Prosecution Service where it assumed a responsibility to the accused[13].

1 *Sirros v Moore* [1975] QB 118, [1974] 3 All ER 776, CA; *Re McC (a minor)* [1985] AC 528, sub nom *McC v Mullan* [1984] 3 All ER 908, HL. The immunity applies to superior court judges even if acting maliciously: *Anderson v Gorrie* [1895] 1 QB 668, CA. Inferior court judges may also be immune from liability when acting maliciously but within jurisdiction: see *Re McC (a minor)* above at 541 and 916 obiter per Lord Bridge of Harwich.

2 See the Courts Act 2003 ss 31, 32; and **MAGISTRATES**.

3 *Sirros v Moore* [1975] QB 118, [1974] 3 All ER 776, CA (judge immune from liability in respect of his decision to order the detention of an alien pending possible deportation, for although he implemented his decision by an irregular and invalid procedure, he did have the authority to make such a decision and had he followed the correct procedure it would have been valid); cf *Re McC (a minor)* [1985] AC 528, sub nom *McC v*

Mullan [1984] 3 All ER 908, HL (judge not immune from liability when ordering the detention of a young offender when the statutory condition precedent to the exercise of that authority, ie the offering of legal representation, had not been fulfilled). In the former case the judge had the authority to make the decision, in the latter case he did not.

4 *Hamond v Howell* (1677) 2 Mod Rep 218.

5 See the Courts Act 2003 ss 31, 32; and **MAGISTRATES**. The position of judges in other inferior courts remains uncertain, although it is clear that, in the absence of specific statutory protection, judges of inferior courts can be liable for torts committed when acting outside their jurisdiction: see the authorities reviewed by Lord Bridge of Harwich in *McC v Mullan* [1984] 3 All ER 908 at 917-924.

6 See *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL (no formulated dispute; no immunity from liability for architect issuing certificates under a building contract); *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL (no formulated dispute; no immunity for accountant appointed to determine the price at which shares were to be sold by one party to another). See also *Palacath Ltd v Flanagan* [1985] 2 All ER 161.

7 See *Palmer v Durnford Ford (a firm)* [1992] QB 483 at 488-489, [1992] 2 All ER 122 at 127 per Simon Tuckey QC; endorsed in *M (a minor) v Newham London Borough Council* [1995] 2 AC 633 at 661, [1994] 4 All ER 602 at 618, CA, per Bingham MR (on appeal [1995] 2 AC 633, [1995] 3 All ER 353, HL). The wider view of witness immunity, adopted in *Evans v London Hospital Medical College (University of London)* [1981] 1 All ER 715, [1981] 1 WLR 184, must now be doubted: see *M (a minor) v Newham London Borough Council* above at 661 and 618 per Bingham MR. See also *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, [2000] 4 All ER 193, HL. For expert witnesses, the immunity extends not only to evidence given in court, but also to the preparation of reports and joint statements which are adopted as evidence: *Stanton v Callaghan* [2000] QB 75, [1998] 4 All ER 961, CA.

8 The reason for this immunity is that the safeguards against impropriety are to be found in procedural rules rather than the law of tort: *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229, [1987] 3 All ER 465. Where the Secretary of State is under a public duty to carry out a balancing exercise in deciding whether to disclose documents that may be subject to public interest immunity, he does not owe a private law duty of care in favour of a private litigant who wishes to see the documents for the purposes of his litigation: *Bennett v Metropolitan Police Comr* [1995] 2 All ER 1, [1995] 1 WLR 488.

9 *Elguzouli-Daf v Metropolitan Police Comr* [1995] QB 335, [1995] 1 All ER 833, CA (Crown Prosecutor not liable for delay in handling forensic evidence resulting in delay in discontinuing prosecution and releasing remanded accused).

10 See *Arthur J S Hall & Co (a firm) v Simons; Barratt v Ansell (t/a Woolf Seddon (a firm)); Harris v Schofield Roberts & Hill (a firm)* [2002] 1 AC 615, [2000] 3 All ER 673, HL; overruling *Rondel v Worsley* [1969] 1 AC 191, [1967] 3 All ER 993, HL.

11 *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, [2002] 3 All ER 721; distinguishing *Arthur J S Hall & Co (a firm) v Simons; Barratt v Ansell (t/a Woolf Seddon (a firm)); Harris v Schofield Roberts & Hill (a firm)* [2002] 1 AC 615, [2000] 3 All ER 673, HL.

12 Where a claimant is wrongly convicted as a result of the negligent conduct of his solicitors in the preparation of his case for trial, he is entitled to claim damages for the loss of chance that he would not have been prosecuted, or, if prosecuted, that he would have been acquitted: *Acton v Graham Pearce & Co (a firm)* [1997] 3 All ER 909.

13 *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692 (liability based on assumption of responsibility to inform court of dropped charges). See also *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464, [1996] 3 All ER 449, CA (police assumed responsibility in relation to plaintiff).

(2) THE STANDARD OF CARE

21. Standard of care.

It is a question of fact whether the defendant has failed to show reasonable care in the particular circumstances[1]. The law lays down the general rules which determine the standard of care which has to be attained, and it is for the court to apply that legal standard of care to its findings of fact so as to decide whether the defendant has attained that standard[2]. The legal standard is objective; it is not that of the defendant himself[3], but that which might be expected from a person of ordinary prudence[4], or person of ordinary care and skill[5], engaged in the type of activity[6] in which the defendant was engaged. There is an element of discretion in the categorisation of the activity against which an objective assessment is to be made, and whilst a learner driver has been assessed against the standard of an experienced driver[7], in other situations the courts have been prepared to recognise a distinction between amateur and professional activities and levels of competence[8].

In determining whether the defendant should have taken particular steps to meet a standard of care, whether by taking precautions against a risk or otherwise, a court may have regard to whether a requirement to take those steps might prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or discourage persons from undertaking functions in connection with a desirable activity[9].

It seems that a child has to attain only the standard of care to be expected of a child of that age[10]. The standard of care may not necessarily be reduced because of other physical incapacities[11].

Where the defendant's conduct has occurred in the course of responding to an emergency, that circumstance will be relevant and, provided the decision was reasonable in the circumstances, there will be no negligence even though the choice turns out to have been the wrong one[12]. It is recognised that a participant in a game or competition is in a somewhat analogous position to one faced with an emergency in that he may have to take a decision in the heat of the moment[13].

1 *Easson v London and North Eastern Rly Co* [1944] KB 421 at 426, [1944] 2 All ER 425 at 431, CA, per du Parcq LJ; *Williams v Mersey Docks and Harbour Board* [1954] 2 Lloyd's Rep 221 at 224, CA, per Lord Goddard. See *Wilson v Governors of Sacred Heart Roman Catholic School* [1998] 1 FLR 663, [1998] Fam Law 249, CA. See also *Fraser v Winchester Health Authority* (1999) 55 BMLR 122, CA (health authority liable for injuries to employee caused by her misuse of equipment where authority failed to give instruction as to its use).

2 *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38, HL.

3 'The standard of foresight of the reasonable man . . . eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question': *Glasgow Corpn v Muir* [1943] AC 448 at 457, [1943] 2 All ER 44 at 48, HL, per Lord Macmillan.

4 *Vaughan v Menlove* (1837) 3 Bing NC 468 at 475 per Tindal CJ.

5 *Heaven v Pender* (1883) 11 QBD 503 at 509, CA, per Brett MR. The test is what a hypothetical reasonable observer could reasonably have foreseen, although much must depend on his powers of observation and the scope of his imagination; one judge may credit him with more foresight than another: see *King v Phillips* [1953] 1 QB 429 at 441, [1953] 1 All ER 617 at 623, CA, per Denning LJ.

6 The objective standard required by the law is one which relates to the type of activity in which the defendant is engaged rather than to the category of actor to which the defendant belongs: see *Wilsher v Essex Area Health Authority* [1987] QB 730 at 750-751, [1986] 3 All ER 801 at 813, CA, per Mustill LJ (revsd on a different point [1988] AC 1074, [1981] 1 All ER 871, HL) (trainee hospital doctor who had made a mistake when undertaking specialist work was to be assessed by not just the standard of the averagely competent and well informed junior houseman but of such a person who fills a post in a unit offering a highly specialised service). See also *Brooks v Home Office* [1999] 2 FLR 33, 48 BMLR 109 (standard of obstetric care and observation a pregnant woman detained in prison is entitled to expect is the same as if she were at liberty, namely that expected of a doctor with sufficient obstetrics expertise).

7 A learner driver 'must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity': *Nettleship v Weston* [1971] 2 QB 691 at 699, [1971] 3 All ER 581 at 586, CA, per Lord Denning MR.

This high standard is imposed to a large extent due to the policy of requiring drivers to be insured (see at 699 and 586 per Lord Denning MR).

8 *Philips v William Whiteley Ltd* [1938] 1 All ER 566, CA (jeweller who had performed a defective ear piercing was assessed by the standard to be expected of jewellers rather than surgeons); *Wells v Cooper* [1958] 2 QB 265, [1958] 2 All ER 527, CA (householder repairing a door was assessed against the standards of a reasonably competent carpenter rather than a professional carpenter); *Cattley v St John Ambulance Brigade* (25 November 1988, unreported), QBD, comment (1990) 6 PN 48 (volunteer first aider required to conform to the standard of volunteers rather than professionals); *Knight v Home Office* [1990] 3 All ER 237, 4 BMLR 85 (standard of care required of a prison hospital caring for a mentally ill detainee could not be judged by the standard appropriate to a psychiatric hospital outside prison). Cf *Moon v Garrett* [2006] EWCA Civ 1121, [2007] ICR 95, [2006] BLR 402 (liability imposed upon DIY home builder, rejecting a submission that this was to impose too high a standard).

9 Compensation Act 2006 s 1. This provision seems to be declaratory of the existing common law (cf *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122).

10 *McHale v Watson* (1966) 115 CLR 199 at 213, Aust HC. 'The standard of care being objective, it is no answer for [a child], any more than it is for an adult to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, not as being personal to himself, but as being a characteristic of humanity at his stage of development and in that sense normal': *McHale v Watson* per Kitto J. *McHale v Watson* was followed in *Mullin v Richards* [1998] 1 All ER 920, [1998] 1 WLR 1305, CA (15-year-old school pupils fencing with plastic rulers). See also *Orchard v Lee* [2009] EWCA Civ 295, [2009] PIQR P285, sub nom *O v L* [2009] All ER (D) 39 (Apr) (considering *Mullin v Richards*). The principle that where the child is a claimant he is not expected to take the same degree of care as an adult is well recognised both in relation to the degree of care for the child required from an adult (see *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398), and in relation to contributory negligence (see *Yachuk v Oliver Blais Co Ltd* [1949] AC 386, [1949] 2 All ER 150, PC).

It seems unlikely that an analogous concession will be made for the aged as they are more likely than children to participate in adult activities such as driving, and are less likely to be supervised. In relation to the standard required of drivers, on grounds of public policy, neither criminal nor civil responsibility is affected by the fact that the driver in question is infirm: see *Nettleship v Weston* [1971] 2 QB 691 at 703, [1971] 3 All ER 581 at 589, CA, per Salmon LJ.

11 See *Roberts v Ramsbottom* [1980] 1 All ER 7, [1980] 1 WLR 823 (driver held liable when he crashed into the plaintiff after suffering a stroke and continuing to drive after becoming aware of his unfitness to drive). In *A-G of Canada v Connolly* (1989) 64 DLR (4th) 84, BC SC, it was held that it would not be just to apply the strict approach in *Roberts v Ramsbottom* where the defendant's mental state was such that he was not capable of foreseeing harm resulting from his act. *Roberts v Ramsbottom* was also distinguished in *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, [1998] RTR 390, CA, in which it was held that a driver will escape liability where he gradually develops a condition which impairs his ability to drive, providing there is no reason why he should be aware of it, and he in fact remains unaware of it. The standard of care in such circumstances is that to be expected of a reasonably competent driver unaware that he is or might be suffering from a condition impairing his ability to drive.

12 This is sometimes called the rule in *The Bywell Castle* (1879) 4 PD 219, CA. It applies even to danger to property: *Parkinson v Liverpool Corpn* [1950] 1 All ER 367, CA, where a dog ran in front of a bus, and the driver, who braked suddenly, was held not liable to a passenger who was thrown to the floor. See also *SS Singleton Abbey (Owners) v SS Paludina (Owners), The Paludina* [1927] AC 16, HL; *Swadling v Cooper* [1931] AC 1, HL; *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC. A police driver pursuing a person attempting to avoid arrest owes him the same duty as he owes anyone else to exercise such care as is reasonable in all the circumstances: *Marshall v Osmond* [1983] QB 1034, [1983] 2 All ER 225, CA (no negligence on the part of police officer pursuing person attempting to avoid arrest in car chase, despite error of judgment).

13 The test is whether injury was caused 'by an error of judgment that a reasonable competitor, being the reasonable man of the sporting world, would not have made': see *Wilks (formerly an infant) v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369 at 374, [1971] 1 WLR 668 at 674, CA, per Edmund Davies LJ, quoting Goodhart (1962) 78 LQR 457 at 496. See also *Wooldridge v Sumner* [1963] 2 QB 43, [1962] 2 All ER 978, CA; *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866, CA; cf *Harrison v Vincent* [1982] RTR 8, CA, where the error was made in preparation for competition rather than in the excitement of the sport and no special allowance was made.

22. Reasonable care.

A person must have regard both to the probability of harm resulting from his actions[1] and to the probable seriousness of the harm[2]. His knowledge of the probabilities must be judged in the light of the evidence available at the time and not with the benefit of hindsight[3]. He may weigh the cost and difficulty of the precautions necessary to prevent the harm resulting[4]. The actual resources available to the particular defendant are not generally relevant[5]. The court may take into account the importance of the activity in which the defendant is engaged[6]. A person is, in general, entitled to assume that others will comply with statutory regulations[7], but not that they will take reasonable care to look out for themselves or will take reasonable steps to avoid common risks when experience shows negligence to be common[8]. A higher degree of care is required of those who know of, or ought to foresee, the presence of blind[9] or other disabled persons[10]. Similarly, the standard of care owed to a child will be more strict so as to take account of the likelihood of his being endangered by the defendant's act[11]. What is habitually done in the same or similar circumstances usually furnishes a test of reasonable care[12], but a person cannot excuse an obvious failure to make some inquiry or take some precaution merely by showing that his failure to do so is in accordance with the established practice in a particular business[13].

1 *Glasgow Corpn v Muir* [1943] AC 448, [1943] 2 All ER 44, HL; *Lloyds Bank Ltd v Railway Executive* [1952] 1 All ER 1248, CA. 'The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled': *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108 at 126, PC. Compare *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078, HL (cricket ball hit out of ground six times in 30 years; no liability) with *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA (cricket ball hit out of ground nine times a year; liability). See also *Thompson v Johnson and Johnson Pty Ltd* (1990) [1992] 3 Med LR 148, Vict SC (no negligence in failure to warn of risks of toxic shock syndrome in relation to use of tampon, as such cases very rare).

2 *Paris v Stepney Borough Council* [1951] AC 367, [1951] 1 All ER 42, HL; *Pentney v Anglian Water Authority* [1983] ICR 464; cf *Withers v Perry Chain Co Ltd* [1961] 3 All ER 676, [1961] 1 WLR 1314, CA; *Beckett v Newalls Insulation Co Ltd* [1953] 1 All ER 250, sub nom *Beckett v Newalls Insulation Co Ltd and Lightfoot Refrigeration Co Ltd* [1953] 1 WLR 8, CA.

3 *Roe v Minister of Health* [1954] 2 QB 66, [1954] 2 All ER 131, CA.

4 The defendant may not be bound to close a factory because the floor is slippery (*Latimer v AEC Ltd* [1953] AC 643, [1953] 2 All ER 449, HL; cf *Johnson v Rea Ltd* [1962] 1 QB 373, [1961] 3 All ER 816, CA), or to immobilise an electric railway for a minor repair (*Hawes v Railway Executive* (1952) 96 Sol Jo 852), or to ensure the safe construction of a vehicle used by the fire service in an emergency (*Watt v Hertfordshire County Council* [1954] 2 All ER 368, [1954] 1 WLR 835, CA). 'A reasonable man would only neglect ... a risk (of small magnitude) if he had some valid reason for doing so, eg that it would involve considerable expense to eliminate the risk': *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty, The Wagon Mound (No 2)* [1967] 1 AC 617 at 642, [1966] 2 All ER 709 at 718, PC.

5 *PQ v Australian Red Cross Society* [1992] 1 VR 19 noted (1992) 108 LQR 8, Vict SC (where the Australian court firmly rejected the notion that the standard to be expected of the Red Cross in testing blood donations for the AIDS virus should be determined in the light of the financial constraints of the charity; the charity has a choice and if it lacks adequate resources, it should choose not to provide the service). There are situations where the defendant's lack of choice may justify taking into account his actual resources: eg where an occupier is under an affirmative duty of care to prevent a natural hazard arising on his land from harming others (see *Goldman v Hargrave* [1967] 1 AC 645, [1966] 2 All ER 989, PC; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1981] 1 All ER 17, CA); and where the defendant is a public authority operating under resource constraints (*Knight v Home Office* [1990] 3 All ER 237, 4 BMLR 85; *Walker v Northumberland County Council* [1995] 1 All ER 737, [1995] ICR 702; *Cekan v Haines* (1990) 21 NSWLR 296, NSW CA).

6 *Daborn v Bath Tramways Motor Co Ltd and Smithey* [1946] 2 All ER 333, CA (driving an ambulance in wartime); *Watt v Hertfordshire County Council* [1954] 2 All ER 368, [1954] 1 WLR 835, CA (operating a fire engine). See also *Walker v Northumberland County Council* [1995] 1 All ER 737, [1995] ICR 702.

7 *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 567, [1948] 2 All ER 238 at 247, HL, per Lord du Parcq.

8 *London Passenger Transport Board v Upson* [1949] AC 155 at 171, [1949] 1 All ER 60 at 69, HL, per Lord Wright; *Boy Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140 at 153, sub nom *Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* [1947] 2 All ER 350 at 356, HL, per Lord Porter. See also *Maguire v Fermanagh DC* [1996] NI 110, NI CA (failure by a local authority to take steps to prevent persons from diving in the shallow end of swimming pool is breach of its duty of care).

9 *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, HL, where it was held that a body conducting operations on a city highway should foresee that blind persons would walk along the pavement, and so should take those precautions reasonably necessary to protect them from harm.

10 'A measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations': *Glasgow Corpn v Taylor* [1922] 1 AC 44 at 67, HL, per Lord Sumner. See also *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398 at 416 per Hamilton LJ; and *R and W Paul Ltd v Great Eastern Rly Co* (1920) 36 TLR 344 (man, known to be deaf, on railway siding); *Paris v Stepney Borough Council* [1951] AC 367, [1951] 1 All ER 42, HL (one-eyed man employed as fitter).

11 The principle is of general application in the law of negligence, but the most frequent class of case is where the child is injured on the premises of another: see the Occupiers' Liability Act 1957 s 2; and PARAS 32, 34.

12 Conformity with common practice is prima facie evidence that the proper standard of care is being taken: *Vancouver General Hospital v McDaniel* (1934) 152 LT 56 at 57-58, PC (approved in *Whiteford v Hunter* [1950] WN 553, HL). See also *Morton v William Dixon Ltd* 1909 SC 807 at 809, Ct of Sess per Lord Dunedin; *Paris v Stepney Borough Council* [1951] AC 367 at 382, [1951] 1 All ER 42 at 49-50, HL, per Lord Normand; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385, HL; *Wright v Cheshire County Council* [1952] 2 All ER 789, CA; *Moore v Maxwells of Emsworth Ltd* [1968] 2 All ER 779, [1968] 1 WLR 1077, CA; *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405, [1984] 1 All ER 881. Note also *Ward v Ritz Hotel (London) Ltd* [1992] PIQR P135, CA, in which it was held that a failure to follow British Standards amounted to negligence as such standards represent the consensus of practical experience. Cf *Gray v Stead* [1999] 2 Lloyd's Rep 559, [1999] All ER (D) 823, CA (not negligent to follow common practice in fishing industry of not providing life-jackets for fishermen working on deck).

13 'No one can claim to be excused for want of care because others are as careless as himself': *Blenkiron v Great Central Gas Consumers Co* (1860) 2 F & F 437 at 440 per Cockburn CJ; and see *Lloyds Bank Ltd v E B Savory & Co* [1933] AC 201, HL; *Manchester Corpn v Markland* [1936] AC 360, HL; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110, HL; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL; *Hook v Consolidated Fisheries Ltd* [1953] 2 Lloyd's Rep 647, CA; *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd* [1930] AC 659, PC; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, [1959] 2 All ER 745, HL; *Brown v Rolls Royce Ltd* [1960] 1 All ER 577, [1960] 1 WLR 210, HL; *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776; *Bank of Cyprus (London) Ltd v Gill* [1979] 2 Lloyd's Rep 508 (on appeal [1980] 2 Lloyd's Rep 51, CA); *Edward Wong Finance Co Ltd v Johnson, Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, PC.

23. Profession of particular skill.

A professional is required to meet the standard of the ordinary skilled man exercising and professing to have the special skill in question[1]. An error of judgment will not amount to negligence unless it is one that would not have been made by a reasonably competent professional with the standard and type of skill of the defendant, acting with ordinary care[2]. Where there are differing and well established professional schools of thought on an issue, a professional will not be regarded as negligent in following one rather than another even if the outcome suggests that the wrong choice was made[3]. The extent of a professional's duty to warn of risk is also assessed by reference to the standards of the profession[4], although in the medical context Commonwealth courts have required disclosure of risks to which the reasonable patient would attach significance[5]. Exceptionally, the court may disregard

professional practice on the ground that it fails to meet the requirements of reasonable care[6]. If it can be demonstrated that the professional opinion given in evidence at trial is not logical, the judge may hold that the body of opinion is not reasonable or responsible[7].

There is a significant volume of case law detailing the standard of care to be expected of the various professions[8].

1 'The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art': *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121, [1957] 1 WLR 582 at 586 per McNair J. See *Penney v East Kent Health Authority* [2000] Lloyd's Rep Med 41, (1999) 55 BMLR 63, CA (where the *Bolam* principle was not applicable when the judge was making findings of fact, even where those findings were made despite conflicting expert evidence). The *Bolam* test will be appropriate where the failure of the professional lies in a conscious choice of courses, but will be inappropriate where the failure lies in an oversight: *J D Williams & Co Ltd v Michael Hyde & Associates* [2000] Lloyd's Rep PN 823, [2001] BLR 99, CA. As to the negligence of a professional adviser in the context of tax avoidance, see *Grimm v Newman* [2002] EWCA Civ 1621, [2003] 1 All ER 67, [2002] STC 1388.

As to the approach to be taken by the court where there is no well of professional experience on which to draw, see *A B v Tameside and Glossop Health Authority* [1997] 8 Med LR 91, (1996) 35 BMLR 79, CA.

2 *Whitehouse v Jordan* [1981] 1 All ER 267, [1981] 1 WLR 246, HL. In some professions the standards are increasingly being set by codes of practice: see eg *Lloyd Cheyham & Co Ltd v Littlejohn & Co* [1987] BCLC 303, [1986] PCC 389 (accountancy).

3 *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635, [1984] 1 WLR 634, HL (medical profession); applied in *Hughes v Waltham Forest Health Authority* (1990) [1991] 2 Med LR 155, Times, 9 November, CA. In *Defreitas v O'Brien* [1995] 6 Med LR 108, 25 BMLR 51, CA, it was held that in the professional context the question was whether there was a responsible body of opinion supporting the particular practice and that this was not to be measured in purely quantitative terms. See also *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067, [1990] 1 WLR 1009, CA (auctioneer).

4 *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, [1985] 1 All ER 643, HL (risks involved in surgery); *Gold v Haringey Health Authority* [1988] QB 481, [1987] 2 All ER 888, CA (same test applies to non-therapeutic surgery). See also *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, [1991] 1 All ER 801 (common practice in relation to abortion); *Moyes v Lothian Health Board* 1990 SLT 444, [1990] 1 Med LR 463, Ct of Sess (common practice in relation to warning of aggravated stroke risk); *Blyth v Bloomsbury Health Authority* (1987) [1993] 4 Med LR 151, CA (common practice in relation to answering patient inquiries about risks).

5 See *Reibl v Hughes* (1980) 114 DLR (3d) 1, Can SC; *Rogers v Whittaker* (1992) 109 ALR 625, 16 BMLR 148, Aust HC.

6 See *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871 at 900, [1985] 1 All ER 643 at 663, HL, per Lord Bridge of Harwich. It is, however, more likely that a court will be prepared to take this approach in a legal professional negligence case: see eg *Edward Wong Finance Co Ltd v Johnson Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, PC.

7 *Bolitho v City and Hackney Health Authority* [1998] AC 232, [1997] 4 All ER 771, HL; applied in *Calver v Westwood Veterinary Group* [2001] Lloyd's Rep Med 20, (2000) 58 BMLR 194, CA.

8 This material is to be found elsewhere in this work. The test applying to professionals may apply in a case where the particular defendant is not professionally qualified: *Adams v Rhymney Valley District Council* [2000] 3 EGLR 25, [2000] All ER (D) 1015, CA. As to the standards required of particular professions see the title relating to the profession in question.

(3) NEGLIGENCE CAUSING DEATH

24. Civil liability.

At common law there was no liability for injury caused by a death to any person other than the deceased[1], except where a cause of action, such as a breach of contract, exists independently of the wrong causing the death. In those exceptional cases loss arising from the death may be included as an element of the damages[2]. For claims by dependants of the deceased, the common law rule has been substantially altered by statute, principally by the legislation incorporated in the Fatal Accidents Act 1976[3]. There used to be a separate principle that claims in tort for personal injuries died with the victim and did not survive for the benefit of his estate[4]. This rule has been abolished by statute[5] and, with the exception of the claim for bereavement damages[6], all causes of action in negligence vested in the deceased person[7] on his death[8] survive for the benefit of his estate[9]. However, no damages are recoverable by the estate in respect of pain and suffering which are in reality part of the death itself, for such a loss is not a recoverable head of damage for the deceased[10]. The original principle is retained[11] to the extent that damages in actions thus preserved are to be calculated without reference to any loss or gain to his estate consequent on his death[12].

1 Eg a father's claim for loss of the services of his unmarried daughter (*Clark v London General Omnibus Co Ltd* [1906] 2 KB 648, CA), or a husband's claim for those of his wife (*Jackson v Watson & Sons* [1909] 2 KB 193, CA), or an employer's claim for the cost of pensions payable to relatives of his deceased employee (*Admiralty Comrs v SS Amerika (Owners)* [1917] AC 38, HL); and see *Rose v Ford* [1937] AC 826 at 839, [1937] 3 All ER 359 at 366, HL, per Lord Russell of Killowen.

2 *Jackson v Watson & Sons* [1909] 2 KB 193, CA, where a wife died through food poisoning from tinned salmon bought by her husband; and in an action for breach of contract he recovered for the loss of her services. See also *Frost v Aylesbury Dairy Co* [1905] 1 KB 608, CA.

3 See PARAS 25-28. The rule did not preclude the executor from bringing actions founded on contract in *Potter v Metropolitan Rly Co* (1875) 32 LT 36, Ex Ch, and *Bradshaw v Lancashire and Yorkshire Rly Co* (1875) LR 10 CP 189.

4 *Admiralty Comrs v SS Amerika (Owners)* [1917] AC 38 at 60, HL, per Lord Sumner; *Rose v Ford* [1937] AC 826 at 833, [1937] 3 All ER 359 at 362, HL, per Lord Atkin, and at 850 and 373 per Lord Wright. The rule was expressed by the Latin maxim *actio personalis moritur cum persona*.

5 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1). This also provides that causes of action subsisting against a deceased person survive against his estate: see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq. As to the time limit for such actions see **LIMITATION PERIODS** vol 68 (2008) PARA 916. Note that s 1(1) does not apply to causes of action for defamation: see s 1(1).

6 The right of a person to claim under the Fatal Accidents Act 1976 s 1A (see PARA 25) does not survive for the benefit of his estate on death: Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 s 4(1)). Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of his estate do not include any exemplary damages or any damages for loss of income in respect of any period after that person's death: Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a) (added by the Administration of Justice Act 1982 s 4(2)).

7 The cause of action is that of the deceased and there is no estoppel by res judicata where the executor has already been unsuccessful in personal proceedings in respect of the same accident: *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA.

8 This phrase means 'vested in him when alive' (*Rose v Ford* [1937] AC 826 at 838, [1937] 3 All ER 359 at 365, HL, per Lord Russell of Killowen), but it is immaterial that death may have followed almost instantaneously (*Morgan v Scoulding* [1938] 1 KB 786, [1938] 1 All ER 28).

9 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1). The rights conferred by this provision are expressed to be in addition to and not in derogation of any rights conferred by the Fatal Accidents Acts 1846 to 1908 (see PARA 25): see the Law Reform (Miscellaneous Provisions) Act 1934 s 1(5).

10 *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, 8 BMLR 70, HL (traumatic asphyxia which caused death at an overcrowded sports stadium would have resulted in pain and suffering from the awareness of impending death, but would have been endured for only a very short period before death).

11 The Law Reform (Miscellaneous Provisions) Act 1934 creates no new cause of action, but preserves from extinction causes of action existing independently: *Rose v Ford* [1937] AC 826 at 839, [1937] 3 All ER 359 at 366, HL, per Lord Russell of Killowen, and at 854 and 376 per Lord Roche.

12 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(c). Funeral expenses may be included: s 1(2)(c).

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25. The Fatal Accidents Act 1976.

Notwithstanding the death of the person injured[1], a person is liable to a claim for damages at the suit of a personal representative suing on behalf of particular classes of dependant under the Fatal Accidents Act 1976[2] if the death has been caused[3] by any wrongful act, neglect or default[4] which is such as would have entitled the person injured, had not death ensued, to maintain an action and recover damages against the person liable in respect of it[5]. A claim for damages for bereavement may also now be brought under the Fatal Accidents Act 1976[6]. A claim for bereavement damages must only be for the benefit of: (1) the spouse or civil partner of the deceased; and (2) where the deceased is an unmarried minor (a) his parents (if he is legitimate); and (b) his mother (if he is illegitimate)[7].

Any damages otherwise recoverable under the Fatal Accidents Act 1976 are reduced to a proportionate extent where the death results partly from the fault of the deceased[8].

1 Any reference to 'injury' includes any disease and any impairment of a person's physical or mental condition: Fatal Accidents Act 1976 s 1(6) (s 1 substituted by the Administration of Justice Act 1982 s 3(1)).

2 The Fatal Accidents Act 1976 consolidates the Fatal Accidents Act 1846 (commonly called 'Lord Campbell's Act'), and the Fatal Accidents Acts of 1864 and 1959. 'Lord Campbell's Act gave an entirely new action, not an action connected with the estate of the deceased in the slightest degree': *Leggott v Great Northern Rly Co* (1876) 1 QBD 599 at 606 per Quain J; and see *Seward v The Vera Cruz (Owner), The Vera Cruz* (1884) 10 App Cas 59 at 70, HL, per Lord Blackburn, to the same effect. The Fatal Accidents Act 1976 does not apply to carriage by air. The Carriage by Air Act 1961 s 3 imposes a similar liability in relation to air passengers even though the plaintiff does not prove any actual wrongful act, neglect or default: see **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 150, 176. A decision on its predecessor, the Carriage by Air Act 1932, established that the damages were wider than under the Fatal Accidents Act 1846 in that they were not restricted to financial loss: *Preston v Hunting Air Transport Ltd* [1956] 1 QB 454, [1956] 1 All ER 443.

3 This includes suicide induced by personal injuries sustained earlier: *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884, [2008] 2 All ER 943. See also *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121.

4 'Wrongful act, neglect or default' includes a breach of contract: *Grein v Imperial Airways Ltd* [1937] 1 KB 50 at 70, [1936] 2 All ER 1258 at 1275, CA, per Greer LJ, and at 88 and 1287 per Greene LJ.

5 See the Fatal Accidents Act 1976 s 1(1). The test as to whether there is a cause of action is to be taken at the moment of death, with the fiction that death has not taken place. At that moment the test is absolute: *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034 at 1041, PC; *Nunan v Southern Rly Co* [1924] 1 KB 223, CA. It is an answer to an action that the deceased before death accepted or recovered compensation from the defendants in satisfaction of all claims in respect of the injury: *Read v Great Eastern Rly Co* (1868) LR 3 QB 555. Where the victim died between trial and appeal, and so had his damages for loss of earnings and amenities greatly reduced, the court pointed out that his dependants could not claim under the Fatal Accidents Acts 1846-1959 for the difference between the two awards: *McCann v Sheppard* [1973] 2 All ER 881, [1973] 1 WLR 540, CA. An action under the Fatal Accidents Act 1976 must not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury (whether because of a time limit in the Act or in any other Act, or for any other reason): Limitation Act 1980 s 12(1).

6 See the Fatal Accidents Act 1976 s 1A(1) (s 1A added by the Administration of Justice Act 1982 s 3(1)).

7 Fatal Accidents Act 1976 s 1A(2) (as added (see note 6); and amended by the Civil Partnership Act 2004 s 83(7)). A fixed sum of £11,800 is to be awarded as damages: Fatal Accidents Act 1976 s 1A(3) (as so added; amended by SI 2007/3489). The Lord Chancellor may vary this sum by order made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Fatal Accidents Act 1976 s 1A(5) (as so added). Where there is a claim for the benefit of both parents of the deceased, the sum must be divided equally (subject to any deduction falling to be made in respect of costs not recovered from the defendant): s 1A(4) (as so added).

8 See the Fatal Accidents Act 1976 s 5 (amended by the Administration of Justice Act 1982 ss 3, 75, Sch 9 Pt I). As to contributory negligence see PARA 75 et seq.

26. Claim by executor or administrator.

Although the right of action under the Fatal Accidents Act 1976 exists for the benefit of the dependants of the deceased[1], the action must be brought by and in the name of the executor or administrator of the deceased[2]. In bringing such an action an executor or administrator is not representing the estate of the deceased on behalf of creditors or beneficiaries generally, but only on behalf of the dependants entitled to claim; damages recoverable are not part of the estate[3]. If there is no executor or administrator, or if no action is brought within six months after the death by and in the name of an executor or administrator, the action may be brought by and in the name of all or any of the persons for whose benefit an executor or administrator could have brought it[4] at any time within the prescribed period after the death[5]. Where the action is brought in the name of any or all of the dependants, it must be for the benefit of the same persons as if it had been brought in the name of an executor or administrator, and the court will not stay the action because the administrator subsequently brings another[6]. No more than one action lies for and in respect of the same subject matter of complaint[7]. The claimant in the action is required to deliver to the defendant or his solicitor full particulars[8] of the dependants for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered[9]. The claim of a dependant not named in the proceedings cannot be considered[10].

1 See the Fatal Accidents Act 1976 s 1(2) (s 1 substituted by the Administration of Justice Act 1982 s 3(1)). This provision is subject to the Fatal Accidents Act 1976 s 1A(2): see s 1(2) (as so substituted).

2 Fatal Accidents Act 1976 s 2(1) (s 2 substituted by the Administration of Justice Act 1982 s 3(1)).

3 *Leggott v Great Northern Rly Co* (1876) 1 QBD 599 at 606; and see *Jeffrey v Kent County Council* [1958] 3 All ER 155 at 158, [1958] 1 WLR 927 at 931 per Paull J. It is not against public policy that a widow should recover damages in respect of the death of her husband by suicide: *Pigney v Pointers Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121. See also *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884, [2008] 2 All ER 943. There is no estoppel by res judicata where the executor has already failed in personal proceedings in respect of the same accident: *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA.

4 Fatal Accidents Act 1976 s 2(2) (as substituted: see note 2).

5 See *Holleran v Bagnell* (1879) 4 LR Ir 740.

6 *M'Cabe v Great Northern Rly Co of Ireland* [1899] 2 IR 123 (the defendant has, by reason of the first action, a defence against that of the administrator and may move to stay it).

7 Fatal Accidents Act 1976 s 2(3) (as substituted: see note 2). See *Cachia v Faluyi* [2001] EWCA Civ 998, [2002] 1 All ER 192, [2001] 1 WLR 1966 (the word 'action' in the sub-section was interpreted to mean 'served process' to give effect to the right of access to a court under the European Human Rights Convention).

8 It is enough if the particulars appear in the statement of claim although not indorsed on the writ: *Stebbings v Holst & Co Ltd* [1953] 1 All ER 925, [1953] 1 WLR 603. For the degree of particularity required see *Brown v Belfast Corpn* [1955] NI 213.

9 Fatal Accidents Act 1976 s 2(4) (as substituted: see note 2).

10 A dependant who is omitted may apply to be joined: *Avery v London and North Eastern Rly Co* [1938] AC 606 at 613, [1938] 2 All ER 592 at 595, HL, per Lord Atkin. Where an action on behalf of a minor had been settled and the action stayed, the stay might be removed to enable the deceased's widow to be added: *Cooper v Williams* [1963] 2 QB 567, [1963] 2 All ER 282, CA.

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27. Persons who may benefit.

An action under the Fatal Accidents Act 1976 must be brought for the benefit of the dependants of the deceased[1]. 'Dependant' means:

5 (1) the wife or husband or former wife or husband of the deceased[2];
6 (2) the civil partner or former civil partner of the deceased;[3]
7 (3) any person who (a) was living with the deceased in the same household immediately before the date of death, and (b) had been living with the deceased in the same household for at least two years before that date[4], and (c) was living during the whole of that period as the husband or wife or civil partner of the deceased[5];
8 (4) any parent or other ascendant of the deceased[6];
9 (5) any person who was treated by the deceased as his parent[7];
10 (6) any child[8] or other descendant of the deceased[9];
11 (7) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage[10];
12 (8) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership[11];
13 (9) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased[12].

Any relationship by marriage or civil partnership must be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child[13], and an illegitimate person must be treated as the legitimate child of his mother and reputed father[14]. The action may be brought in all cases in which the injured person, if he had lived, could have maintained an action in English courts against the persons responsible for the injury[15]. Accordingly, relatives of a foreigner killed by a collision caused by the negligent navigation of a ship, whether British or otherwise, on the high seas are entitled to bring a claim in respect of his death[16]. The action can be maintained only upon proof of pecuniary damage and a verdict for nominal damages cannot be entered[17]. An action lies only for the benefit of a dependant who shows that he has lost a reasonable expectation of pecuniary advantage[18].

1 Fatal Accidents Act 1976 s 1(2) (s 1 substituted by the Administration of Justice Act 1982 s 3(1)).

2 Fatal Accidents Act 1976 s 1(3)(a) (as substituted: see note 1). Reference to the former wife or husband of the deceased includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved: s 1(4) (as so substituted).

3 Fatal Accidents Act 1976 s 1(3)(aa) (added by the Civil Partnership Act 2004 s 83(2)).

4 See *Pounder v London Underground Ltd* [1995] PIQR P217, in which it was held that a brief absence from the home during the two year period prior to death did not give rise to a break in continuity in the context of a ten year relationship.

5 Fatal Accidents Act 1976 s 1(3)(b) (as substituted (see note 1); amended by the Civil Partnership Act 2004 s 83(3)). A distinction must be drawn between wanting and intending to live in the same household, planning to do so, and actually doing so: see *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 1 FCR 642, [2005] 2 FLR 517 (claim failed on the facts).

6 Fatal Accidents Act 1976 s 1(3)(c) (as substituted: see note 1).

7 Fatal Accidents Act 1976 s 1(3)(d) (as substituted: see note 1).

8 'Child' includes a child en ventre sa mère (*The George and Richard* (1871) LR 3 A & E 466), but in such a case the claim may not be made on behalf of the child until it is born (see *Phipps (suing as next friend of three infants) Setterfield v Cunard White Star Co Ltd, The Queen Mary* [1951] 1 TLR 359, [1951] 1 Lloyd's Rep 54).

9 Fatal Accidents Act 1976 s 1(3)(e) (as substituted: see note 1).

10 Fatal Accidents Act 1976 s 1(3)(f) (as substituted: see note 1).

11 Fatal Accidents Act 1976 s 1(3)(fa) (as substituted (see note 1); amended by the Civil Partnership Act 2004 s 83(4)).

12 Fatal Accidents Act 1976 s 1(3)(g) (as substituted: see note 1).

13 Fatal Accidents Act 1976 s 1(5)(a) (as substituted (see note 1); amended by the Civil Partnership Act 2004 s 83(6)). As to adopted persons see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 323 et seq.

14 Fatal Accidents Act 1976 s 1(5)(b); and see *Phipps (suing as next friend of three infants) Setterfield v Cunard White Star Co Ltd, The Queen Mary* [1951] 1 TLR 359, [1951] 1 Lloyd's Rep 54.

15 See PARA 25 text and note 5.

16 *Davidsson v Hill* [1901] 2 KB 606; *The Esso Malaysia* [1975] QB 198, sub nom *The Esso Malaysia, Cox v Esso Malaysia (Owners)* [1974] 2 All ER 705.

17 *Duckworth v Johnson* (1859) 4 H & N 653. When the widow is financially better off consequent on the death, but only through taking account of a pension which is not deductible from an award under the Fatal Accidents Acts 1846-1959, she has suffered damage for this purpose: *Humphrey v Ward Engineering Services Ltd* (1975) 119 Sol Jo 461. As to the assessment of damages and what amounts to pecuniary damage see **DAMAGES**.

18 *Franklin v South Eastern Rly Co* (1858) 3 H & N 211; *Dalton v South Eastern Rly Co* (1858) 4 CBNS 296 at 305 per Willes J (approved in *Taff Vale Rly Co v Jenkins* [1913] AC 1 at 6, HL, per Viscount Haldane LC).

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28. Period of limitation.

An action under the Fatal Accidents Act 1976 may not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the

injury[1]; nor may an action under that Act be brought after the expiration of three years from the date of death, or the date of knowledge of the person for whose benefit the action is brought, whichever is the later[2]. In the case of damages for loss of life or other personal injury caused by the fault of a ship to any person on board another ship, no proceedings may be brought after a period of two years from the date when the loss of life or injury was suffered[3]. If the action of the deceased was not time-barred at his death but would have been before the claim under the Fatal Accidents Act 1976 was made, the latter claim is valid provided that it is made within three years after the death[4].

1 Limitation Act 1980 s 12(1). The reference to the Fatal Accidents Act 1976 includes a reference to the Fatal Accidents Act 1864: Limitation Act 1980 s 40(1), Sch 2 para 4(2).

2 Limitation Act 1980 s 12(2). As to the date of knowledge where there is more than one person for whose benefit an action is brought see **LIMITATION PERIODS** vol 68 (2008) PARA 1000. The court has power to override the time limit for actions under the Fatal Accidents Act 1976: see the Limitation Act 1980 s 33. As to limitation periods as a defence see PARA 73.

3 See the Merchant Shipping Act 1995 s 190(1)(b), (3)(b); *The Caliph* [1912] P 213; *The Alnwick* [1965] P 357, [1965] 2 All ER 569, CA. Note that these decisions were based on the Maritime Conventions Act 1911 s 8 (repealed); see now the Merchant Shipping Act 1995 s 190. Any court, if satisfied that there has not been during any period allowed for bringing proceedings any reasonable opportunity of arresting the defendant ship within (1) the jurisdiction of the court, or (2) the territorial sea of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, must extend the period allowed for bringing proceedings to an extent sufficient to give a reasonable opportunity of so arresting the ship: s 190(6). See also the Limitation Act 1980 s 39. See further **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1063.

4 See *British Columbia Electric Rly Co Ltd v Gentile* [1914] AC 1034, PC; *Venn v Tedesco* [1926] 2 KB 227.

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2. SITUATIONS IN WHICH A DUTY OF CARE ARISES

(1) DUTY OF OCCUPIER

(i) Duty to Visitors

29. Scope of the Occupiers' Liability Act 1957.

The provisions of the Occupiers' Liability Act 1957[1], regulating the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them[2], have effect in place of the rules of the common law[3]. Where an act or omission creates a dangerous condition which later causes harm to a visitor in using the premises the Act applies[4].

The provisions of the Act in relation to an occupier of premises and his visitors also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate: (1) the obligations of a person occupying or having control[5] over any fixed or movable structure[6], including any vessel, vehicle or aircraft[7]; and (2) the obligations of a person occupying or having control over any premises or structure in respect of damage to property[8], including the property of persons who are not themselves his visitors[9].

The duty which an occupier of premises owes to persons other than visitors is governed by the Occupiers' Liability Act 1984[10].

1 The Occupiers' Liability Act 1957 binds the Crown, but as regards the Crown's liability in tort it does not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947, and that Act and in particular s 2 of it applies in relation to duties under the Occupiers' Liability Act 1957 ss 2-4 (s 4 now repealed) as statutory duties: s 6.

2 See the Occupiers' Liability Act 1957 ss 1(1), 2, 3; and PARAS 32, 34, 37.

3 Occupiers' Liability Act 1957 s 1(1).

4 There is some disagreement as to whether the Occupiers' Liability Act 1957 extends to dangerous activities performed on the premises. In *Ferguson v Welsh* [1987] 3 All ER 777, [1987] 1 WLR 1553, HL, Lord Goff of Chieveley (at 786 and 1563-1564) stressed that the duty related to seeing that the visitor would be reasonably safe in using the premises and that, as a consequence, it had no application to injury caused to a workman by the manner in which he carried out his work on the premises. However, Lord Keith of Kinkel (at 783 and 1560) argued that it would be an unduly strict construction of the Act to narrow its protection so as to exclude liability from dangers created by a negligent act of a contractor. The prevalent view is that the Act is confined to situations in which the condition of the premises itself is dangerous and does not cover dangerous activities unrelated to the premises as such but which just happen to be carried on there. On this view the common law of negligence continues to govern cases where acts such as shooting a visitor (*Chettle v Denton* (1951) 95 Sol Jo 802, CA), dropping a sack from a negligently maintained crane onto a visitor (*Gallagher v Humphrey* (1862) 6 LT 684), causing a train to run into a visitor (*Slater v Clay Cross Co Ltd* [1956] 2 QB 264, [1956] 2 All ER 625, CA; *Railways Comr v MacDermott* [1967] AC 169, [1966] 2 All ER 162, PC), or setting dangerous machinery in motion (*Excelsior Wire Rope Co Ltd v Callan* [1930] AC 404, HL) are performed. As to the similar issue in relation to the Occupiers' Liability Act 1984 see *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA; and PARA 40.

At common law duties are also imposed in respect of the state of premises on persons in control of them in some capacity other than that of occupier, eg education authorities: *Rich v LCC* [1953] 2 All ER 376, [1953] 1 WLR 895, CA. These duties are unaffected by the Occupiers' Liability Act 1957 because they are not imposed on defendants as occupiers. In some instances the defendant may have duties both as an occupier and in some other capacity; the plaintiff may then recover under either head: *Slade v Battersea and Putney Group Hospital Management Committee* [1955] 1 All ER 429, [1955] 1 WLR 207 (a visitor to a hospital who was injured on a slippery floor was owed a duty by the defendants both as occupiers and as hospital authority); *Ward v Hertfordshire County Council* [1970] 1 All ER 535, [1970] 1 WLR 356, CA (child hurt by a school playground flint wall; the defendant's duties both as occupier and as education authority were separately considered, although the council was held not liable because the wall was not dangerous).

5 See *Bunker v Charles Brand & Son Ltd* [1969] 2 QB 480, [1969] 2 All ER 59 (engineering firm retained control of a machine roller when it called in a specialist contractor to modify the machine); and *Kearney v Eric Waller Ltd* [1967] 1 QB 29, [1965] 3 All ER 352. See also *McCook v Lobo* [2002] EWCA Civ 1760, [2003] ICR 89 (owner of premises where building was undertaken by building contractor did not have control of building site).

6 Persons having control over structures were treated as occupiers of premises at common law: see *Francis v Cockrell* (1870) LR 5 QB 501 (grandstand); *Woodman v Richardson and Concrete Ltd* [1937] 3 All ER 866, CA (scaffolding); *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343, [1941] 3 All ER 156, CA (lift); *Kenny v Electricity Supply Board* [1932] IR 73 (electricity pylon); *MacLaughlin v Antrim Electricity Supply Co* [1941] NI 23 (electricity pylon); *Wheeler v Copas* [1981] 3 All ER 405 (ladder); *Kealey v Heard* [1983] 1 All ER 973, [1983] 1 WLR 573 (scaffolding).

7 Occupiers' Liability Act 1957 s 1(3)(a).

8 Loss consequential on the damage to property is recoverable, so that a car-hire firm could recover loss of earnings when its car was damaged: *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028. However, the rules do not generally apply where property is stolen by a third person: see *Ashby v Tolhurst* [1937] 2 KB 242, [1937] 2 All ER 837, CA; *Tinsley v Dudley* [1951] 2 KB 18, [1951] 1 All ER 252, CA (car parks); *Edwards v West Herts Group Hospital Management Committee* [1957] 1 All ER 541, [1957] 1 WLR 415, CA (hostel).

9 Occupiers' Liability Act 1957 s 1(3)(b).

10 See PARA 40.

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30. Who is an occupier.

The rules of the common law continue to determine who is an occupier[1]. In order to be an occupier exclusive occupation is not required, and the test is whether a person has some degree of control associated with and arising from his presence in and use of or activity in the premises[2]. Two or more persons may be occupiers of the same land, each under a duty to use such care as is reasonable in relation to his degree of control[3].

1 See the Occupiers' Liability Act 1957 s 1(2). As to the persons to be treated as occupiers of premises for the purposes of the Occupiers' Liability Act 1984 see PARA 40.

2 *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL (a decision on the meaning of 'occupier' for the purposes of the Occupiers' Liability Act 1957, but the judgments show that it applies to all cases, whether at common law or under the Act, where it is necessary to determine the duty of care owed by occupiers to entrants). See also *Jordan v Achara* (1988) 20 HLR 607, CA (landlord as an occupier). A highway authority does not occupy a footpath on land owned by another although it has a statutory obligation to maintain it: *Whiting v Hillingdon London Borough Council* (1970) 68 LGR 437. See also *Harris v Birkenhead Corpn* [1976] 1 All ER 341, [1976] 1 WLR 279, CA (a corporation which has given notice of entry under a compulsory purchase order but has not entered is an occupier); *Bailey v Armes* [1999] EGCS 21, CA (defendant was not liable for injury caused to a child who fell off a roof, as he had not exercised a sufficient degree of control over the relevant premises). The following earlier decisions remain relevant precedents. A concessionaire without a lease in a fair ground is an occupier (*Humphreys v Dreamland (Margate) Ltd* (1930) 100 LJKB 137, HL); a contractor converting a ship into a troopship in dry dock occupies the ship (*Hartwell v Grayson Rollo and Clover Docks Ltd* [1947] KB 901, CA); and a local authority which has requisitioned a house is an occupier (*Hawkins v Coulsdon and Purley UDC* [1954] 1 QB 319, [1954] 1 All ER 97, CA), even in respect of those parts of the house in which it is allowing homeless persons to live (*Greene v Chelsea Borough Council* [1954] 2 QB 127, [1954] 2 All ER 318, CA). See also *Clancy v Comrs of Public Works in Ireland* [1992] 2 IR 449 (defendants, who controlled a ruined castle but were not owners of it, were liable when a child fell through a gap in the floor of a tower room).

3 In *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475, [1966] 1 All ER 88, CA, the owners of a club and the defendants who ran a restaurant in the club under licence were both held to be occupiers. In *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028, a contractor (as well as the owner) was an occupier of the whole building although part of the building was separated by a screen beyond which he went only to attend to heating and lighting. Where two persons are in occupation of the same land it is possible for a third party to be a lawful visitor to one occupier and a trespasser in relation to the other: see *Ferguson v Welsh* [1987] 3 All ER 777 at 785, [1987] 1 WLR 1553 at 1563, HL, per Lord Goff of Chieveley.

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31. Who is a visitor.

At common law it was necessary to distinguish between invitees, licensees and trespassers on premises. The approximate distinction between invitees and licensees was that an invitee was requested to enter the premises in the interest of the occupier, whereas a licensee was merely permitted to enter. The extensive case law on the distinction between the two is no longer important because 'visitor' for the purposes of the Occupiers' Liability Act 1957 embraces those persons who are invitees or licensees at common law[1], that is, anyone to whom the occupier gives any invitation or permission to enter or use the premises. However, it remains important to distinguish between those who are and those who are not visitors, because the former are

governed by the Occupiers' Liability Act 1957 and the latter by the Occupiers' Liability Act 1984[2], both of which were enacted to have effect in place of the rules of common law[3]. A licence may not be implied merely because the occupier knows of the claimant's presence or has failed to take the necessary steps to prevent his entry; rather there must be evidence of express permission or that the occupier has so conducted himself that he cannot be heard to say that he did not give permission[4]. The rules are the same for children, but an open pathway[5] or a knowledge that a track is and has long been constantly used, together with a failure to take any steps to indicate that ingress is not permitted[6], may amount to a tacit licence[7]. Although the mere fact that the occupier has on his premises a dangerous object alluring to children does not make him liable to a child trespasser, its presence in a place accessible to children may aid the inference of a licence[8], so that a child who may otherwise have been treated as a trespasser may because of the allurement be found to be a visitor[9]. In some circumstances occupiers are deemed only to permit young children to enter subject to the condition that they are accompanied by a responsible adult[10].

1 See the Occupiers' Liability Act 1957 s 1(2).

2 See PARA 40.

3 See the Occupiers' Liability Act 1957 s 1(1); and the Occupiers' Liability Act 1984 s 1(1). As to whether someone is a visitor for the purposes of the 1957 Act see *Stone v Taffe* [1974] 3 All ER 1016, [1974] 1 WLR 1575, CA, where the manager of a public house, in breach of contract, allowed P and others to have a party after hours and P, who was unaware of that restriction in the contract, was held to be a visitor not a trespasser as against the brewery which employed the manager. A person entering any premises in exercise of rights conferred by virtue of: (1) the Countryside and Rights of Way Act 2000 s 2(1); or (2) an access agreement or order under the National Parks and Access to the Countryside Act 1949, is not, for the purposes of the Occupiers' Liability Act 1957, a visitor of the occupier of the premises: s 1(4) (substituted by the Countryside and Rights of Way Act 2000 s 13(1)). Similarly, a person exercising a public right of way has no claim under the Occupiers' Liability Act 1957 because he is not an invitee or licensee at common law (see *Greenhalgh v British Railways Board* [1969] 2 QB 286, [1969] 2 All ER 114, CA; applied in *Holden v White* [1982] QB 679, [1982] 2 All ER 328, CA), but he would be entitled to the duty owed by an occupier to persons other than visitors under the Occupiers' Liability Act 1984. The user of a public right of way does so as of right, not as a visitor: *McGeown v Northern Ireland Housing Executive* [1995] 1 AC 233, [1994] 3 All ER 53, HL.

4 *Edwards v Railway Executive* [1952] AC 737 at 747, [1952] 2 All ER 430 at 437, HL, per Lord Goddard.

5 *Cooke v Midland Great Western Rly of Ireland* [1909] AC 229, HL, where the defendant railway company kept an unlocked turntable close to a public road. Children were in the habit of playing with it, having gained access to it through a well-worn gap in the defendant's fence, and the defendant was liable to such a child, who was held to be a licensee, for injuries sustained while playing on the turntable.

6 *Lowery v Walker* [1911] AC 10, HL.

7 *Edwards v Railway Executive* [1952] AC 737 at 744, [1952] 2 All ER 430 at 435, HL, per Lord Porter. See also *Robert Addie & Sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at 372-373, HL, per Viscount Dunedin; and cf *Gough v National Coal Board* [1954] 1 QB 191, [1953] 3 All ER 1283, CA.

8 *Hardy v Central London Rly Co* [1920] 3 KB 459, CA; *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, CA.

9 Even if a licence is not inferred the occupier may incur liability to a child trespasser by virtue of the Occupiers' Liability Act 1984 s 1(3), if the allurement rendered the presence of children foreseeable: see PARA 40.

10 *Latham v R Johnson & Nephew Ltd* [1913] 1 KB 398, CA; *Bates v Stone Parish Council* [1954] 3 All ER 38, [1954] 1 WLR 1249, CA, where there were no circumstances to qualify the permission given by the defendant council to children to enter its playground, and a child aged three was held to be a licensee. In *Phipps v Rochester Corpn* [1955] 1 QB 450, [1955] 1 All ER 129, Devlin J criticised this rule on the ground that it was lacking in precision, eg as to what degree of incapacity on the part of the child and what qualifications of his companion are called for. Nevertheless the rule stands on the authority of the Court of Appeal. Persons entering as of right, such as police with search warrants and officials empowered by statute to enter premises, are visitors; at common law the only doubt was whether they were invitees or licensees, and that is no longer relevant since it was always clear that they were not trespassers.

32. Common duty of care.

The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes[1] for which he is invited or permitted[2] by the occupier to be there[3]. The relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in the visitor, so that, for example, in proper cases the occupier must be prepared for children[4] to be less careful than adults[5]; and the occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so[6]. In determining whether the occupier has discharged the common duty of care to a visitor regard must be had to all the circumstances[7].

1 'When you invite a person into your house to use the staircase, you do not invite him to slide down the banisters': see *The Carlgarth* [1927] P 93 at 110, CA, per Scrutton LJ. See also *Walker v Midland Rly Co* (1886) 55 LT 489, HL (hotel guest entering service room); *Jenkins v Great Western Rly Co* [1912] 1 KB 525, CA (child straying beyond area of licence); *Mersey Docks and Harbour Board v Procter* [1923] AC 253, HL (plaintiff in fog, 50 yards from proper route); *Hillen and Pettigrew v ICI (Alkali) Ltd* [1936] AC 65, HL (loading cargo off hatch covers); *Hourigan v Mariblanca Navegacion SA* [1958] 2 Lloyd's Rep 277, CA (plaintiff remaining on ship 45 minutes after performing the purpose of his visit). However, a visitor does not become a trespasser by reason only of a small and inadvertent encroachment (*Hardcastle v South Yorkshire Rly and River Dun Co* (1859) 4 H & N 67 at 74 per Pollock CB, as explained in *Mersey Docks and Harbour Board v Procter* above at 261; *Braithwaite v South Durham Steel Co Ltd* [1958] 3 All ER 161, [1958] 1 WLR 986; and see *Johnstone v Glasgow Corpn* (1953) 103 L Jo 171, Ct of Sess (invitee encroaching by four inches); *Public Transport Commission of New South Wales v Perry* (1977) 14 ALR 273 (railway passenger awaiting train, had a fit and fell on track)); nor does a child who strays upon an alluring object (*Holdman v Hamlyn* [1943] KB 664, [1943] 2 All ER 137, CA (threshing machine); *Gough v National Coal Board* [1954] 1 QB 191, [1953] 2 All ER 1283, CA (slowly moving truck)); nor does a visitor who is acting reasonably in search of lavatory accommodation (*Cairns v Boyd* (1879) 6 R (Ct of Sess) 1004; *Gould v McAuliffe* [1941] 2 All ER 527, CA (adult); *Pearson v Coleman Bros* [1948] 2 KB 359, [1948] 2 All ER 274, CA (child); cf *Walker v Midland Rly Co* (1886) 55 LT 489, HL, where the lavatories were clearly shown; and see also *Lee v Luper* [1936] 3 All ER 817). As to visitors wandering in the dark see *Wilkinson v Fairrie* (1862) 1 H & C 633; *Paddock v North-Eastern Rly Co* (1868) 18 LT 60; *Lewis v Ronald* (1909) 26 TLR 30, DC.

2 For the purposes of the Occupiers' Liability Act 1957 s 2, persons who enter premises for any purpose in the exercise of a right conferred by law must be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not: s 2(6). Such persons will include police entering with search warrants, enforcement officers and inspectors with statutory rights of entry and, in certain circumstances, employees of public undertakings. Section 2(6) does not extend the range of persons to whom a duty is owed but merely enacts that if a person is using a right for the purpose for which it is granted, even though he is not invited or permitted to be on the defendant's premises, the common duty of care is owed to him, as a visitor; but no duty is owed under the Occupiers' Liability Act 1957 to a person using a public right of way: *Greenhalgh v British Railways Board* [1969] 2 QB 286, [1969] 2 All ER 114, CA. Note that a duty may now be owed to a person using a public right of way under the Occupiers' Liability Act 1984: see PARA 40.

3 Occupiers' Liability Act 1957 s 2(2).

4 As to the duty to trespassing children see PARA 40.

5 Occupiers' Liability Act 1957 s 2(3)(a). See eg *Jolley v Sutton London Borough Council* [2000] 3 All ER 409, [2000] 1 WLR 1082, HL (child injured while playing on abandoned boat). See also *Perry v Butlins Holiday World (t/a Butlins Ltd)* [1997] EGCS 171, CA (child falling onto low wall at holiday park).

6 Occupiers' Liability Act 1957 s 2(3)(b). Thus an occupier is entitled to expect that a chimney sweep will guard against dangers from flues: *Roles v Nathan* [1963] 2 All ER 908, [1963] 1 WLR 1117, CA. See also *Richards v Brooks Wharf & Bull Wharf Ltd* [1965] 2 Lloyd's Rep 304 (skilled dock worker); *Caddis v Gettrup* (1967) 202 Estates Gazette 517 (window cleaner); *Christmas v General Cleaning Contractors Ltd* [1952] 1 KB

141, [1952] 1 All ER 39, CA (window cleaner) (affd on other grounds sub nom *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110, HL); *Clare v L Whittaker & Son Ltd* [1976] ICR 1 (experienced roofer); *Wheeler v Trustees of St Mary's Hall, Chislehurst* (1989) Times, 10 October (specialist sporting activity). But see also *Eden v West & Co* [2002] EWCA Civ 991, [2003] PIQR Q16 (joiner injured by collapse of window frame with no lintel ought have been warned of the risk). Moreover, despite the Occupiers' Liability Act 1957 s 2(3)(b), an occupier who causes a fire on his premises owes a duty of care to a fireman who attends the fire. The duty extends to the ordinary risks and dangers inherent in a fireman's occupation: *Salmon v Seafarer Restaurants Ltd* [1983] 3 All ER 729, [1983] 1 WLR 1264; *Ogwo v Taylor* [1988] AC 431, [1987] 3 All ER 961, HL. The Occupiers' Liability Act 1957 s 2(3)(b) applies only to risks incidental to employment and not to risks incidental to the premises visited in the course of employment: *Woollins v British Celanese Ltd* (1966) 1 KIR 438, CA. See also *Flagg v Kent County Council* [1993] PIQR P389, CA (fireman on training exercise injured not by smoke hazard but by unrelated hazard of protruding steel rod); and *Bates v Parker* [1953] 2 QB 231, [1953] 1 All ER 768, CA (window cleaner injured through some defect in the staircase when going upstairs in the ordinary way to reach the windows on an upper floor).

7 See the Occupiers' Liability Act 1957 s 2(4); and PARAS 34-35. See eg *Lewis v Six Continents plc* [2005] EWCA Civ 1805, (2006) Times, 20 January, [2005] All ER (D) 170 (Dec) (hotel guest fell out of window; safety measures required to ensure complete safety not reasonably practical).

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33. The standard of care.

In the light of the circumstances of the case the court has to decide as an issue of fact whether the defendant has failed to achieve the standard required by the Occupiers' Liability Act 1957 for the common duty of care[1]. At common law the courts developed the following principles with regard to injured children. In deciding whether there is a danger, regard must be had to the physical and mental powers of a child visitor[2]; in short, what is not a danger to an adult may be a danger to a child. This may be so because of the allurement or temptation to a child of some condition on the land[3]. In determining the standard of care owed to a child who is not accompanied by a guardian, it will be material to inquire whether, in the circumstances, the occupier could reasonably have expected the presence of the child unaccompanied[4].

1 An occupier has, on the facts, been held liable for failure to light a steep flight of steps leading out of the clubroom of a public house (*Stone v Taffe* [1974] 3 All ER 1016, [1974] 1 WLR 1575, CA), for injury to a part-time cleaner who slipped on a floor so polished as to be dangerous (*Adams v S J Watson & Co Ltd* (1967) 117 NLJ 130), to a pedestrian who slipped on an icy driveway (*Bains v Hill* (1992) 93 DLR (4th) 117), for the death of a man killed when a flag pole erected by him fell against a high voltage cable of which the occupier was aware but gave no warning (*McDowell v FMC (Meat) Ltd* (1968) 5 KIR 456, CA), for injury to a holidaymaker who dived off a diving-board placed over shallow water and struck his head on the bottom (*Davies v Tenby Corpn* [1974] 2 Lloyd's Rep 469, CA; and see similarly *Banks v Bury Borough Council* [1990] CLY 3284, where inadequate indication of the depth of the shallow end of a pool was given), to a passenger on a liner who slipped on newly laid and untreated linoleum on a sloping floor (*Appleton v Cunard Steam-ship Co Ltd* [1969] 1 Lloyd's Rep 150), to a ferry passenger who fell off an unstable chair (*Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70), to a decorator by carelessly switching on electricity (*Fisher v CHT Ltd (No 2)* [1966] 2 QB 475, [1966] 1 All ER 88, CA), to a girl aged 16 who was injured when she put her hand through the outer gate of a lift to close the inner gate and the lift moved (*Sandford v Eugene Ltd* (1970) 115 Sol Jo 33), to a spectator trampled at a football match (*Hosie v Arbroath Football Club* 1978 SLT 122, Ct of Sess), to a policeman hit by detached paving stones hurled by hooligans at a football match (*Cunningham v Reading Football Club Ltd* [1992] PIQR P141, 157 LG Rev 481), to a participant in a sporting event hit by a stray discus when inadequate safety precautions had been taken (*Morrell v Owen* (1993) Times, 14 December), to a visitor injured in a gymnastics accident at a youth centre (*Fowles v Bedfordshire County Council* [1995] PIQR P380, CA), to a visitor tripping over uncleared litter at a parcels depot (*Jennings v British Railways Board* (1984) 134 NLJ 584) and to a 12-year-old boy playing with rubbish that the occupier had failed to clear due to industrial action (*Woolfall v Knowsley Borough Council* (1992) Times, 26 June, CA).

An occupier has, on the facts, been held not liable for injury to a stevedore alleged to have been caused by slipping on oil on a ship's deck (*Lowther v H Hogarth & Sons Ltd* [1959] 1 Lloyd's Rep 171), for injury to a woman aged 60, who slipped on the stairs of a block of flats which were unlighted at the time because a time

switch was running fast (*Irving v LCC* (1965) 109 Sol Jo 157), for injury to a customer in a supermarket who fell over a pile of cartons in a gangway (*Doherty v London Co-operative Society Ltd* (1966) 110 Sol Jo 74), for the death of a visitor alleged to be caused by the inadequacy of a handrail and the absence of a bulb in a light at the top of stairs (*Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL), for injury to a customer who tripped over a dog in the bar of a public house (*Carroll v Garford* (1968) 112 Sol Jo 948), or who slipped and cut himself on a glass dropped by another customer (*Sawyer v H & G Simonds Ltd* (1966) 197 Estates Gazette 877), to a visitor to a block of flats who fell through a gap in the main entrance door caused by the removal of a glass panel (*Shortall v Greater London Council* (1969) 210 Estates Gazette 25), to a child aged eight falling against a brick and flint wall of a school playground which had stood since 1862 (*Ward v Hertfordshire County Council* [1970] 1 All ER 535, [1970] 1 WLR 356, CA), to a footballer breaking his leg against a concrete wall near but outside the touch-line (*Simms v Leigh Rugby Football Club Ltd* [1969] 2 All ER 923), to an athlete hit by a ricocheting discus where everyone had been kept out of the way of foreseeable deflection (*Wilkins v Smith* [1976] LS Gaz R 938), to a nurse who tripped over a patient's locker when hurrying to give assistance (*Atherton v Mersey Regional Health Authority* (9 February 1993, unreported), CA), to a party reveller who fell over a three feet high hotel balustrade (*Ward v Ritz Hotel (London) Ltd* [1992] PIQR P315, CA) and as a hotel proprietor for snow in the forecourt (*Wood v Morland & Co Ltd* (1971) 115 Sol Jo 569, DC).

As to the common duty of care see PARA 32. As to the burden of proving breach of duty see PARA 62. For the effect of contractual terms or notices which purport to exclude or restrict the common duty of care see the Unfair Contract Terms Act 1977; and PARA 74.

2 *Cooke v Midland Great Western Rly of Ireland* [1909] AC 229 at 238, HL, per Lord Atkinson; cf *Gough v National Coal Board* [1954] 1 QB 191, [1953] 2 All ER 1283, CA. The cases are numerous but they all turn on their particular facts, eg *Williams v Cardiff Corpn* [1950] 1 KB 514, [1950] 1 All ER 250, CA (a grassy slope with broken glass at the foot is a trap for a four-year-old child). The principle stated in the text also applied at common law in the case of mentally disordered persons and the blind, and it seems that it will continue to apply to them under the Occupiers' Liability Act 1957.

3 Eg *Glasgow Corpn v Taylor* [1922] 1 AC 44, HL (brightly coloured poisonous berries in a park within easy reach of the child). See also *Jolley v Sutton London Borough Council* [2000] 3 All ER 409, [2000] 1 WLR 1082, HL (defendants liable for leaving an abandoned boat in a dangerous condition causing serious injury to a child playing on it); *Adams v Southern Electricity Board* (1993) Times, 21 October, CA (defendant held liable to a 14-year-old for failing to have anti-climbing devices properly fitted to a pole carrying an electrical transformer).

4 See *Phipps v Rochester Corpn* [1955] 1 QB 450, [1955] 1 All ER 129, which contains a review by Devlin J of the rights of child visitors. See also *Simkiss v Rhondda Borough Council* (1983) 81 LGR 460, CA.

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34. Warning and knowledge of danger.

In determining whether an occupier of premises has discharged the common duty of care[1], regard is to be had to all the circumstances, so that, for example, where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe[2]. The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor[3]. The apportionment provisions of the Law Reform (Contributory Negligence) Act 1945[4] apply to an action for breach of the common duty of care exactly as to any other action for negligence[5].

1 As to the common duty of care see PARA 32.

2 Occupiers' Liability Act 1957 s 2(4)(a). A notice in an unsuitable place (*Coupland v Eagle Bros Ltd* (1969) 210 Estates Gazette 581) or placed too low (*Stewart v Routhier* (1974) 45 DLR (3d) 383, 395, Can SC) is insufficient, and so also is an oral warning not given seriously (*Bishop v J S Starnes & Sons Ltd* [1971] 1 Lloyd's Rep 162; cf *Roles v Nathan* [1963] 2 All ER 908, [1963] 1 WLR 1117, CA (oral warning sufficient)). If a danger is obvious, a visitor is able to appreciate it and a warning is therefore not needed: *Staples v West Dorset District Council* [1995] PIQR P439, CA; *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA

Civ 646, [2009] PIQR P1. An occupier's failure to erect signs warning against a particular danger cannot be relied on by a claimant who is injured by a different danger: *Darby v National Trust* [2001] EWCA Civ 189, [2001] PIQR P372 (obvious danger of drowning would not have been avoided if occupier had warned of danger of disease from water).

3 Occupiers' Liability Act 1957 s 2(5). The question whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another: s 2(5). As to such risks see further PARA 69 et seq. In *Simms v Leigh Rugby Football Club Ltd* [1969] 2 All ER 923, a player who collided with a wall outside the touch line was defeated by this defence. Note in *White v Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA, the defence failed against a spectator injured at a jalopy race in a field (but the claim was defeated on other grounds). As to the effect of the Unfair Contract Terms Act 1977 s 2(3) on the defence of volenti non fit injuria see PARA 74.

4 See PARA 75 et seq.

5 *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, HL. In *Woollins v British Celanese Ltd* (1966) 1 KIR 438, CA; *Bunker v Charles Brand & Son Ltd* [1969] 2 QB 480, [1969] 2 All ER 59; and *Stone v Taffe* [1974] 3 All ER 1016, [1974] 1 WLR 1575, CA, the plaintiff's damages were reduced by one-half; in *McDowell v FMC (Meat) Ltd* (1968) 5 KIR 456, CA, by one-fifth; and in *Bird v King Line Ltd* [1970] 2 Lloyd's Rep 349, by two-thirds. See also PARA 75.

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35. Liability for independent contractors.

In determining whether an occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that, for example, where damage is caused to a visitor by a danger due to the faulty execution of any work of construction[1], maintenance or repair[2] by an independent contractor employed by the occupier, the occupier is not to be treated without more[3] as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor[4] and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done[5]. The duty may also extend to ensuring that the independent contractor has put in place appropriate safety precautions[6]. In some circumstances the duty may include asking the contractor about his insurance position[7], but there is no general rule to this effect[8].

1 This includes work incidental to construction: *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028. As to the common duty of care see PARA 32.

2 Even though the cause of harm falls outside these words, eg the stowing of cargo by a stevedore, the occupier may still discharge his common duty of care by relying on the stevedore as an independent contractor: *Mullis v United States Lines Co* [1969] 1 Lloyd's Rep 109. The Occupiers' Liability Act 1957 s 2(4) states that s 2(4)(b) only contains examples of the duty of care.

3 If the occupier as well as his contractor is careless he will still be liable: *Coupland v Eagle Bros Ltd* (1969) 210 Estates Gazette 581.

4 In *Cook v Broderip* (1968) 206 Estates Gazette 128, a flat occupier was not liable to his domestic help who was injured because a contractor had negligently put a new switch fuse in the flat; he was entitled to trust the contractor.

5 Occupiers' Liability Act 1957 s 2(4)(b). The duty to supervise may extend to acts during the period of delegation and before the work is completed: *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, [1968] 1 WLR 1028. Unless there are special circumstances, it will not be reasonable to expect the occupier to supervise an independent contractor to ensure that he carries out his duty to his employees to use a safe system of work: *Ferguson v Welsh* [1987] 3 All ER 777, [1987] 1 All WLR 1553, HL. See also *Gray v Fire Alarm*

Fabrication Services Ltd [2006] EWCA Civ 1496, [2007] ICR 247 (no duty owed to employees of independent contractor where the occupier was unaware that dangerous work was to be undertaken).

6 See *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, [2003] All ER (D) 102 (Nov) (firework display). A failure to provide a health and safely plan as required by health and safety legislation does not automatically give rise to liability under the Occupiers' Liability Act 1957: *McCook v Lobo* [2002] EWCA Civ 1760, [2003] ICR 89.

7 See *Gwilliam v West Hertfordshire Hospital NHS Trust* [2002] EWCA Civ 1041, [2003] QB 443, [2002] 3 WLR 1425 (duty of care discharged where occupier of premises inquired about insurance position of independent contractor who provided fairground game on which visitor injured).

8 See *Naylor (t/a Mainstreet) v Payling* [2004] EWCA Civ 560, [2004] PIQR P615, [2004] All ER (D) 83 (May) (nightclub owner had no duty to check whether independent contractor held insurance).

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36. Persons who contract with the occupier.

Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty which he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, is the common duty of care[1]. This provision does not affect the obligations imposed by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport[2], or by virtue of any contract of bailment[3].

1 Occupiers' Liability Act 1957 s 5(1). As to the common duty of care see PARA 32. This provision applies to fixed and movable structures as it applies to premises: s 5(2). An action based on s 5 is in contract, not in tort, but those who enter premises under a contract have the alternative of suing in tort under s 2(1): *Sole v W J Hallt Ltd* [1973] QB 574, [1973] 1 All ER 1032, where the plaintiff's contributory negligence would have barred his claim in contract, but it merely reduced his damages on his tort claim under the Occupiers' Liability Act 1957 s 2(1). As to the liability of the occupier of an airport to aircraft owners with which it contracts, see *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep 403, [1997] CLC 698 (exclusion clause in defendant's standard terms effective in the absence of recklessness).

2 A carrier owes a duty to his passengers in respect of the state of the vehicle, whether or not a contract was made between them: see **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 41, 44. It seems that this provision does not then affect the right of such a passenger to sue in tort under the Occupiers' Liability Act 1957 s 1(3)(a) (as to which see PARA 29). A fare-paying passenger hurt on a railway platform has the benefit of an implied contractual term that the platform is reasonably safe (*Protheroe v Railway Executive* [1951] 1 KB 376, [1950] 2 All ER 1093); whereas a gratuitous user of the platform would be owed the common duty of care because he is not there by virtue of a contract.

3 Occupiers' Liability Act 1957 s 5(3).

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37. Visitors entering pursuant to contract with a third person.

Where an occupier of premises is bound by contract to permit persons who are strangers to the contract[1] to enter or use the premises[2], the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract[3], but, subject to any provision of the contract to the contrary, must include[4] the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty[5]. However, an occupier who has taken all reasonable care is not answerable to strangers to the contract, unless it expressly so provides, for dangers due to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and those acting under his direction and control[6].

1 'Stranger to the contract' means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled: Occupiers' Liability Act 1957 s 3(3).

2 A common example is that of a visitor to the lessee of premises, the means of access to which the lessor retains in his own occupation. Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this provision applies as if the tenancy were a contract between the landlord and tenant: Occupiers' Liability Act 1957 s 3(4). As to the nature of a statutory tenancy see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 831.

3 This provision in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into, and tenancies created, before 1 January 1958 (the date of commencement of the Occupiers' Liability Act 1957) as well as to those entered into or created after that date: ss 3(5), 8(3).

4 These mandatory words presumably prevent the lessor from excluding his common duty of care by exhibiting a notice, and he is not free to do so under the Occupiers' Liability Act 1957 s 2(1) (as to which see PARA 38). See also the Unfair Contract Terms Act 1977; and PARA 74.

5 Occupiers' Liability Act 1957 s 3(1). In so far as the provision enlarges the duty owed by an occupier beyond the common duty of care, it has effect only in relation to obligations undertaken, or renewed by agreement, express or implied, after 1 January 1958: ss 3(5), 8(3). See also the provision of more general application in the Contracts (Rights of Third Parties) Act 1999 s 1; and **CONTRACT**.

6 Occupiers' Liability Act 1957 s 3(2).

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38. Exclusion of liability.

An occupier of premises owes the 'common duty of care'[1], to all his visitors except in so far as he is free[2] to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise[3]. He may exclude liability by attaching conditions to a licence[4] provided that his visitor has agreed[5]. The freedom of the occupier to exclude or restrict business liability resulting from the common duty of care is now severely curtailed by the Unfair Contract Terms Act 197[76.]

1 See PARA 32.

2 A statute may restrict this right, eg the Road Traffic Act 1988 s 149, with regard to passengers being carried in vehicles when third-party insurance is compulsory. Conversely a visitor may be bound by agreement or otherwise, although he has not agreed, when the occupier excludes liability by rules made under byelaws, which are binding under statutory authority, whether or not agreed to by the visitor. It seems that the duty owed to an entrant by right will not be excluded by notice because no agreement to negative the occupier's duty can be inferred.

3 Occupiers' Liability Act 1957 s 2(1).

4 *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35, CA (a notice stating that those who entered the land did so at their own risk was held to be effective even though the visitor had not agreed to its terms. The court reasoned that as the occupier had a right to exclude visitors altogether from his land and would owe no duty to them if they entered as trespassers, he also had a right to exclude them unless they were taken to have agreed to the notice); *White v Blackmore* [1972] 2 QB 651, [1972] 3 All ER 158, CA.

5 In *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA, a lighterman injured by a defective rope from a dock while he was working on a barge was not bound by an exclusionary notice because by the time he could read it as he was approaching the dock he no longer had a choice not to go in the dock.

6 See PARA 74.

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(ii) Duty to Neighbours

39. Nature of duty.

An occupier of premises is under a duty[1] to take reasonable care to prevent damage to persons and property on adjoining premises[2]. The harm may result from failure to repair his premises[3] or from negligent conduct in the use of them[4]. These principles also apply where harm to a tenant or his family results from dangers on parts of the premises retained by the landlord[5]. The nature and extent of an occupier's obligations to his neighbours cannot be defined by reference to those owed to his landlord[6]. An occupier has a duty of care to remove hazards on his land whether natural or man-made, for example a fire caused by lightning striking a tree[7]. An occupier is also liable for damage caused to his neighbours by a fire which he has negligently caused[8] or allowed to spread, and the statutory provision which exempts persons from liability for fires accidentally beginning on their premises[9] does not apply in a case where there is such negligence[10].

1 In this branch of the law there is a considerable overlap of negligence and nuisance: see further **NUISANCE**.

2 *Hughes v Percival* (1883) 8 App Cas 443, HL. The premises for the benefit of which the present rule applies, are those in respect of which someone other than the defendant has a vested interest in possession. See also *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, CA; *King v Liverpool City Council* [1986] 3 All ER 544, [1986] 1 WLR 890, CA; *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA.

3 *Cunard v Antifyre Ltd* [1933] 1 KB 551, DC.

4 In the same way an occupier has a duty towards those persons using the adjoining highway: *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078, HL.

5 *Cunard v Antifyre Ltd* [1933] 1 KB 551, DC; *Taylor v Liverpool Corpn* [1939] 3 All ER 329. Where the danger was in existence at the time of the creation of the tenancy the landlord has been held not liable: *Cheater v Cater* [1918] 1 KB 247, CA (landlord held not to be liable for the death of tenant's horse from eating leaves from a projecting yew tree which was in the same state at the commencement of the lease as when the horse ate the leaves); *Shirvell v Hackwood Estates Co Ltd* [1938] 2 KB 577, [1938] 2 All ER 1, CA (the tenants are deemed to have taken the land as they found it at the time of the lease).

6 *Hawkins v Dhawan and Mishiku* (1987) 19 HLR 232, CA (occupier not liable for damage caused to neighbour's flat arising from blocked overflow to wash hand basin).

7 *Goldman v Hargrave* [1967] 1 AC 645, [1966] 2 All ER 989, PC. If water normally percolates from the defendant's land to the plaintiff's, and the defendant pumps out the water from his land and by so stopping the subterranean flow causes settlement damage to the plaintiff's land, the plaintiff has no remedy, because the defendant has no duty to adjoining occupiers in respect of percolating water: *Langbrook Properties Ltd v Surrey County Council* [1969] 3 All ER 1424, [1970] 1 WLR 161; see further **WATER AND WATERWAYS** vol 100 (2009) PARAS 104 et seq, 220. In *Smith v Scott* [1973] Ch 314, [1972] 3 All ER 645, the court held that a landlord did not owe a duty to his neighbour to use care in selecting his tenants.

8 *Mulholland and Tedd Ltd v Baker* [1939] 3 All ER 253. See also *Ribee v Norrie* (2000) 81 P & CR D37, 33 HLR 777, CA (landlord held liable to third parties for failing to prevent tenants from negligently causing fire). There may sometimes also be liability under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330: see **NUISANCE** vol 78 (2010) PARA 148.

9 Ie the Fires Prevention (Metropolis) Act 1774 s 86: see **FIRE SERVICES** vol 18(2) (Reissue) PARA 5; **LANDLORD AND TENANT** 27(1) (2006 Reissue) PARA 428.

10 *Filliter v Phippard* (1847) 11 QB 347; *Musgrove v Pandelis* [1919] 2 KB 43, CA; *Mulholland and Tedd Ltd v Baker* [1939] 3 All ER 253. See also *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 710, HL.

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(iii) Duty to Persons other than Visitors

40. Duty to persons other than visitors.

The common law rules[1] as to the liability of occupiers for injury suffered by persons other than their visitors have been replaced by the provisions of the Occupiers' Liability Act 1984[2], which determine (1) whether any duty is owed by a person as occupier[3] of premises to persons other than his visitors[4] in respect of any risk of their suffering injury[5] on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them[6]; and (2) if so, what the duty is[7].

Under these provisions an occupier of premises owes a duty to another not being his visitor in respect of any risk as mentioned above if:

14 (a) he is aware of the danger or has reasonable grounds to believe that it exists[8];

15 (b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned[9] or that he may come into the vicinity of the danger, in either case, whether he has lawful authority for being in that vicinity or not[10]; and

16 (c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection[11].

Where an occupier owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned[12]. Any duty owed in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk[13]. No duty is owed to any person in respect of risks willingly accepted as his by that person[14]; and no duty is owed under the Occupiers' Liability Act 1984 to persons using the highway[15]. Where a person owes a duty under the Act, he does not, by reason of any breach of that duty, incur any liability in respect of any loss of or damage to property[16].

Persons exercising for recreational purposes the right of access to land which is access land for the purposes of the Countryside and Rights of Way Act 2000[17] are 'persons other than visitors' for the purposes of the Occupiers' Liability Act 1984[18]. An occupier of access land owes no duty to any person in respect of (i) a risk resulting from any natural feature of the landscape or from any river, stream, ditch or pond whether or not a natural feature[19]; or (ii) a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile[20]. However, this does not prevent an occupier from owing a duty in respect of any risk where the danger concerned is due to anything done by the occupier with the intention of creating that risk, or being reckless as to whether that risk is created[21].

In determining whether any, and if so what, duty is owed[22] by an occupier of land at any time when the right of access conferred by the Countryside and Rights of Way Act 2000[23] is exercisable in relation to the land, regard is to be had, in particular, to:

17 (A) the fact that the existence of that right ought not to place an undue burden (whether financial or otherwise) on the occupier[24];

18 (B) the importance of maintaining the character of the countryside, including features of historic, traditional or archaeological interest[25]; and

19 (C) any relevant guidance given[26].

Unlike the Occupiers' Liability Act 1957, the Occupiers' Liability Act 1984 does not include any provision contemplating the exclusion of liability by notice[27], and it seems unlikely that the duty owed under the 1984 Act can be excluded in this way[28]. The Occupiers' Liability Act 1984 only governs an occupier's liability as occupier; if the injury is caused by the action of the occupier rather than the condition of the premises, liability will be governed by the common law but will be determined along the same lines as liability under the 1984 Act[29].

1 Under the common law the occupier owed a 'humanitarian duty' to the trespasser: *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL.

2 See the Occupiers' Liability Act 1984 s 1. Section 1 binds the Crown, but as regards the Crown's liability in tort it does not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947: Occupiers' Liability Act 1984 s 3. As to the liability of occupiers to their visitors see the Occupiers' Liability Act 1957; and PARA 29 et seq.

3 The person who is to be treated as an occupier of any premises (which, for these purposes, includes any fixed or movable structure) is any person who owes in relation to the premises the duty referred to in the Occupiers' Liability Act 1957 s 2 (the common duty of care): see the Occupiers' Liability Act 1984 s 1(2)(a). 'Movable structure' includes any vessel, vehicle or aircraft: s 1(9).

4 The persons who are to be treated as the visitors of the occupier are those who are his visitors for the purpose of the common duty of care referred to in the Occupiers' Liability Act 1957 s 2: see the Occupiers' Liability Act 1984 s 1(2)(b).

5 'Injury' means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition: Occupiers' Liability Act 1984 s 1(9).

6 Occupiers' Liability Act 1984 s 1(1)(a). See *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39, [2006] 1 WLR 953, [2006] All ER (D) 27 (Feb) (danger resulted from the trespasser's activities rather than the state of the premises themselves).

7 Occupiers' Liability Act 1984 s 1(1)(b). General negligence principles are relevant to the determination of duty, including considerations of social utility as well as foreseeability: see *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122 at [34] et seq per Lord Hoffman.

8 Occupiers' Liability Act 1984 s 1(3)(a).

9 See *White v St Albans City and District Council* (1990) Times, 12 March, CA (the fact that an occupier takes a precaution, eg fencing, to stop people getting onto land where there is a danger, does not establish that he has reasonable grounds to believe that someone is likely to come into the vicinity of the danger).

10 Occupiers' Liability Act 1984 s 1(3)(b). See *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231, [2003] QB 1008, [2003] 3 All ER 1101 (no duty owed by harbour owner, as occupier, to trespasser diving into harbour in middle of night in midwinter).

11 Occupiers' Liability Act 1984 s 1(3)(c). See *Ratcliff v McConnell* [1999] 1 WLR 670, [1999] 03 LS Gaz R 32, CA (no duty owed by the occupier of a swimming pool to warn an adult trespasser of the dangers of diving in too shallow water). See also *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122.

12 Occupiers' Liability Act 1984 s 1(4).

13 Occupiers' Liability Act 1984 s 1(5). The fact that people take no notice of given warnings cannot create a duty to take further steps to protect them: *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122; *Rhind v Astbury Water Park Ltd* [2004] EWCA Civ 756, 148 Sol Jo LB 759, [2004] All ER (D) 129 (Jun); *Evans v Kosmar Villa Holidays plc* [2007] EWCA Civ 1003, [2008] 1 All ER 530, [2008] 1 WLR 297.

14 Occupiers' Liability Act 1984 s 1(6). The question whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another: s 1(6). See *Titchener v British Railways Board* [1983] 3 All ER 770, sub nom *McGinlay (or Titchener) v British Railways Board* [1983] 1 WLR 1427, HL (decision under Scottish legislation).

15 Occupiers' Liability Act 1984 s 1(7). Section 1 does not affect any duty owed to persons using the highway: s 1(7). 'Highway' means any part of a highway other than a ferry or waterway: s 1(9).

16 Occupiers' Liability Act 1984 s 1(8).

17 See the Countryside and Rights of Way Act 2000 Pt I (ss 1-46), especially s 2(1); and **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583. 'Access land' means any land which: (1) is shown as open country on a map in conclusive form issued by the appropriate countryside body for the purposes of Pt 1; (2) is shown on such a map as registered common land; (3) is registered common land in any area outside Inner London for which no such map relating to registered common land has been issued; (4) is situated more than 600 metres above sea level in any area for which no such map relating to open country has been issued; or (5) is dedicated for the purposes of Pt 1 under s 16: s 1(1). See also **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 580.

18 See the Occupiers' Liability Act 1984 s 1(2); and the text and notes 1-4.

19 Occupiers' Liability Act 1984 s 1(6A)(a) (s 1(6A)-(6C) added by the Countryside and Rights of Way Act 2000 s 13(2)). For these purposes, any plant, shrub or tree of whatever origin, is to be regarded as a natural feature: Occupiers' Liability Act 1984 s 1(6B) (as so added).

20 Occupiers' Liability Act 1984 s 1(6A)(b) (as added: see note 19).

21 Occupiers' Liability Act 1984 s 1(6C) (as added: see note 19). Where the land is coastal margin for the purposes of Pt 1 (including any land treated as coastal margin by virtue of s 16), at any time when the right conferred by the Countryside and Rights of Way Act 2000 s 2(1) is exercisable in relation to land which is access land for the purposes of Pt I, an occupier of the land owes (subject to the Occupiers' Liability Act 1984 s 1(6C)) no duty by virtue of s 1 to any person in respect of a risk resulting from the existence of any physical feature (whether of the landscape or otherwise): s 1(6A) (modified by s 1(6AA) (added by the Marine and Coastal Access Act 2009 s 306)).

22 Ie by virtue of the Occupiers' Liability Act 1984 s 1.

23 Ie under the Countryside and Rights of Way Act 2000 s 2(1): see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583.

24 Occupiers' Liability Act 1984 s 1A(a) (s 1A added by the Countryside and Rights of Way Act 2000 s 13(3)).

25 Occupiers' Liability Act 1984 s 1A(b) (as added: see note 24).

26 Occupiers' Liability Act 1984 s 1A(c) (as added: see note 24). The reference in the text to guidance is to that given under the Countryside and Rights of Way Act 2000 s 20: see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 593.

27 See PARA 38. As to agreements to exclude or restrict liability see PARA 74.

28 Unlike visitors, trespassers have no licence to enter to which a condition excluding liability could be attached (although the result is potentially anomalous in according greater protection to trespassers than visitors).

29 See *Revill v Newbery* [1996] QB 567 at 576-577, [1996] 1 All ER 291 at 298-299, CA, per Neill LJ (occupier held liable for shooting and injuring a trespasser attempting burglary; trespasser's damages reduced for contributory negligence). Neill LJ considered that the duty under the Occupiers' Liability Act 1984 was imposed on an occupier as occupier and that liability for his activities was governed by the common law; such liability to be determined on the same lines as if one were considering a breach of duty under the Occupiers' Liability Act 1984 s 1. Hence, it was not possible for the defendant to argue that the claimant's claim was barred for ex turpi causa non oritur actio, as Parliament had decided, in drafting s 1, that an occupier cannot not treat a burglar as an outlaw.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(2) DUTY OF THOSE WHO ARE NOT OCCUPIERS TO THOSE ON THE PREMISES/41. Liability of builders and contractors.

(2) DUTY OF THOSE WHO ARE NOT OCCUPIERS TO THOSE ON THE PREMISES

41. Liability of builders and contractors.

A builder who is not the owner of premises is liable to a tenant or a member of his family who is injured in consequence of negligent construction[1]. Whenever a contractor, or a landlord during the lease, installs appliances on the premises, or a contractor executes repairs, or a contractor or a landlord during the lease commits an act of misfeasance, whether or not in the course of a dangerous operation, he owes a duty to those on the premises to take reasonable care for their safety[2]. This duty of care is owed even to trespassers[3]. A contractor may owe a duty of care to a sub-contractor's employee[4].

1 *Gallagher v N McDowell Ltd* [1961] NI 26; *Sharpe v E T Sweeting & Son Ltd* [1963] 2 All ER 455, [1963] 1 WLR 665, where a tenant's wife was injured eight years after the defendant built the house for the local authority.

2 *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL, where a contractor was held to be liable to a visitor when he left the access to a house in a dangerous state; *Miller v South of Scotland Electricity Board* 1958 SC (HL) 20 (if the defendant board carelessly disconnected electricity in premises belonging to another and about to be demolished, it would be liable to a child who later received a shock from a live cable). These cases overrule cases such as *Malone v Laskey* [1907] 2 KB 141, CA, which confined the liability of contractors to things dangerous in themselves.

3 *Buckland v Guildford Gas Light and Coke Co* [1949] 1 KB 410, [1948] 2 All ER 1086; *Davis v St Mary's Demolition and Excavation Co Ltd* [1954] 1 All ER 578, [1954] 1 WLR 592; *Creed v John McGeoch & Sons Ltd* [1955] 3 All ER 123, [1955] 1 WLR 1005; *Aldrich v Henry Boyer Ltd* (1960) Times, 16 January, CA; *Railways Comr v Quinlan* [1964] AC 1054, [1964] 1 All ER 897, PC.

4 See *Makepeace v Evans Brothers (Reading) (a firm)* [2001] ICR 241, [2000] BLR 737, CA (no duty where employee experienced and equipment commonplace).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(2) DUTY OF THOSE WHO ARE NOT OCCUPIERS TO THOSE ON THE PREMISES/42. Liability of professional advisers.

42. Liability of professional advisers.

Architects and other professional advisers are liable in negligence if their careless plans or advice in relation to buildings result in physical harm to those on the site[1]. However, where the loss is economic, for example the cost of repairing a defect resulting from the careless plans, neither advisers[2], nor contractors[3], nor local authority inspectors[4] will normally be regarded as owing a duty to anyone other than the client[5].

1 *Clay v A J Crump & Sons Ltd* [1964] 1 QB 533, [1963] 3 All ER 687, CA, where an architect was held liable for directing a wall to be left standing during demolition whereupon it collapsed on the plaintiff who was working on the site; *Driver v William Willet (Contractors) Ltd* [1969] 1 All ER 665, where a consulting engineer was held liable to a workman for failing to advise the builder about an unsafe hoist which caused the plaintiff's injuries.

2 *Preston v Torfaen Borough Council* (1993) 26 HLR 149, 65 BLR 1, CA (soil engineer); *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership (a firm)* [1993] 3 All ER 467, 65 BLR 21 (architect); *Wessex Regional Health Authority v HLM Design* (1994) 10 Const LJ 165, 71 BLR 32 (architect or engineer).

3 *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499, [1990] 2 All ER 943, HL.

4 *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL.

5 See PARA 15.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(2) DUTY OF THOSE WHO ARE NOT OCCUPIERS TO THOSE ON THE PREMISES/43. Liability after disposal of premises.

43. Liability after disposal of premises.

Under the Defective Premises Act 1972, where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises by the doing of the work is not abated by the subsequent disposal of the premises by the person who owed the duty[1]. Nothing in the Act prevents a claimant from relying on the common law of negligence, but liability will only normally arise where the claimant or his property has suffered physical damage as a result of the defective work[2]. The cost of repairing the defective work is classed as economic loss and will not be recoverable at common law unless there is a special relationship between the parties[3].

1 Defective Premises Act 1972 s 3(1). See further **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 77-79.

2 See *Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, CA.

3 *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL. See PARA 15.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(2) DUTY OF THOSE WHO ARE NOT OCCUPIERS TO THOSE ON THE PREMISES/44. Liability of landlords with powers relating to repairs.

44. Liability of landlords with powers relating to repairs.

Important duties are imposed by the Defective Premises Act 1972 on landlords who are under an obligation for the maintenance or repair of premises, or who are empowered to repair[1]. The duty of care under these provisions is wide; it extends towards trespassers, and towards those outside the premises, and it applies where the landlord merely has a right to enter to carry out maintenance or repairs[2].

If an owner knows of a defect (not created by him) in his premises before he sells or lets them, but neither repairs it nor gives warning of the defect, the Defective Premises Act 1972 imposes no liability on him for harm which results after he has disposed of them by sale or lease as the case may be, and there is no liability at common law[3].

1 See the Defective Premises Act 1972 s 4; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 475. A landlord's duty under s 4 is a duty to take reasonable care in all the circumstances, analogous to the common duty of care and the ordinary law of negligence: *Sykes v Harry* [2001] EWCA Civ 167, [2001] QB 1014, [2001] 3 WLR 62.

2 See *Boldack v East Lindsey District Council* (1998) 31 HLR 41, CA (removal of paving slab neither repair nor maintenance).

3 See *Southwark London Borough Council v Mills* [2001] 1 AC 1, [1999] 4 All ER 449, HL (landlord not liable for inadequate soundproofing); cf *Cavalier v Pope* [1906] AC 428, HL (which remains good law: see *McNerny v Lambeth London Borough Council* (1988) 21 HLR 188, CA); *Bromley v Mercer* [1922] 2 KB 126, CA; *Davis v Foots* [1940] 1 KB 116, [1939] 4 All ER 4, CA (a case which would now be decided differently because of the Landlord and Tenant Act 1985 s 11 (as to which see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 416), but the principle is unaffected).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(3) DUTY IN RELATION TO DANGEROUS OPERATIONS AND THE USE OF DANGEROUS ARTICLES/45. Nature of duty.

(3) DUTY IN RELATION TO DANGEROUS OPERATIONS AND THE USE OF DANGEROUS ARTICLES

45. Nature of duty.

The performance of dangerous work and the possession, use or supply[1] of dangerous things[2] impose a duty to take special precautions[3]. There is no legal classification of work or things as dangerous or not dangerous[4]. Danger is a matter of degree and every activity is fraught with some possible element of danger to others[5]. The law in all cases exacts a degree of care commensurate with the risk created, and the more dangerous the act the greater the care that must be taken in performing it[6]. However, the liability of the person on whom the duty is imposed is not absolute; it arises only where there is some element of negligence on his part[7].

1 As to the obligations arising from the supply of such things see PARA 47.

2 If the thing amounts to a movable structure, including any vessel, vehicle or aircraft, in the occupation or control of the defendant, his visitors are owed the statutory common duty of care in place of that at common law: see the Occupiers' Liability Act 1957 s 1(1), (3); and PARA 29 et seq.

3 As to the persons to whom the duty is owed in the case of the supply of dangerous things see PARA 47.

4 Such a distinction based on rigid categories is 'unnatural' and 'not significant': see *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 594-595, HL, per Lord Atkin; approved in *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 105, PC. Prior to *M'Alister (or Donoghue) v Stevenson* the law had recognised a separate category of 'dangerous chattels', for only then did a duty of care exist in respect of chattels. Now the position is that there is really no category of dangerous things; there are only some things which require more and some

which require less care: see *Beckett v Newalls Insulation Co Ltd* [1953] 1 All ER 250 at 254, sub nom *Beckett v Newalls Insulation Co Ltd and Lightfoot Refrigeration Co Ltd* [1953] 1 WLR 8 at 15, CA, per Singleton LJ. See also *Paine v Colne Valley Electricity Supply Co Ltd and British Insulated Cables Ltd* [1938] 4 All ER 803 at 808 per Goddard LJ.

5 *Read v J Lyons & Co Ltd* [1947] AC 156 at 172, [1946] 2 All ER 471 at 477, HL, per Lord Macmillan; *Hodge & Sons v Anglo-American Oil Co* (1922) 12 Ll L Rep 183 at 187, CA, per Scrutton LJ; *Chapman (or Oliver) v Saddler & Co* [1929] AC 584 at 599, HL, per Lord Dunedin; *Parker v Oloxo Ltd and Senior* [1937] 3 All ER 524 at 528 per Hilbery J.

6 The degree of care which a duty involves must be proportioned to the degree of risk involved where the duty is not fulfilled: *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108 at 126, PC.

7 *Chapman (or Oliver) v Saddler & Co* [1929] AC 584 at 599, HL, per Lord Dunedin.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(3) DUTY IN RELATION TO DANGEROUS OPERATIONS AND THE USE OF DANGEROUS ARTICLES/46. Duty to take special precautions.

46. Duty to take special precautions.

Work or articles which have been held to call for special precautions include the launching of a ship[1], the use of a traction engine[2], fireworks[3], firearms[4], a soldering lamp[5], a liquefied petroleum cylinder[6], explosives[7] and surgical treatment[8]. Operations connected with the handling of petroleum[9], the distribution of gas[10] and electricity[11] and the discharge of waste[12] also call for special precautions and are in addition subject to statutory provisions for safety[13]. Persons who leave dangerous things where they are likely to be used or affected by others[14], and particularly by young persons[15], are responsible if the interference should reasonably have been foreseen and results in injury.

1 *The Andalusian* (1877) 2 PD 231; *The George Roper* (1883) 8 PD 119.

2 *Powell v Fall* (1880) 5 QBD 597, CA.

3 *Whitby v C T Brock & Co* (1888) 4 TLR 241, CA.

4 *Potter v Faulkner* (1861) 1 B & S 800 at 805 per Erle J. As to firearms and other dangerous articles coming into the hands of children see note 15; PARAS 47 note 13, 50 note 4.

5 *Holliday v National Telephone Co* [1899] 2 QB 392, CA.

6 *Beckett v Newalls Insulation Co Ltd* [1953] 1 All ER 250, sub nom *Beckett v Newalls Insulation Co Ltd and Lightfoot Refrigeration Co Ltd* [1953] 1 WLR 8, CA.

7 *Mitchell v National Coal Board* (1957) 107 L Jo 266 (provision of insufficient shelter on firing). See also *Williams v Eady* (1893) 10 TLR 41, CA; *Clarke v Army and Navy Co-operative Society Ltd* [1903] 1 KB 155, CA. For statutory provisions regarding explosives see **EXPLOSIVES** vol 17(2) (Reissue) PARA 901 et seq.

8 *Cassidy v Ministry of Health* [1951] 2 KB 343, [1951] 1 All ER 574, CA. See also *Hollis v Dow Corning Corpn* (1993) 103 DLR (4th) 520, BC CA (manufacturer's duty to warn of risks resulting from use of breast implants). Treatment involving the risk of HIV infection may now fall into this category: see *Ter Neuzen v Korn* (1993) 103 DLR (4th) 473, BC CA (artificial insemination); and *Re HIV Haemophiliac Litigation* [1990] NLJR 1349, CA (blood products; discovery issues only).

9 *Musgrove v Pandelis* [1919] 2 KB 43, CA (criticised on another issue in *Collingwood v Home and Colonial Stores Ltd* [1936] 3 All ER 200, CA); *Hodge & Sons v Anglo-American Oil Co* (1922) 12 Ll L Rep 183, CA; *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509, [1942] 1 All ER 491, HL (approving *Jefferson v Derbyshire Farmers Ltd* [1921] 2 KB 281, CA). As to the safety provisions relating to the handling of petroleum see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1760 et seq.

10 *Blenkiron v Great Central Gas Consumers Co* (1860) 2 F & F 437; *Mose v Hastings and St Leonards Gas Co* (1864) 4 F & F 324; *Parry v Smith* (1879) 4 CPD 325; *Jackson v Carshalton Gas Co* (1888) 5 TLR 69; *Paterson v Blackburn Corpn* (1892) 9 TLR 55, CA; *Dominion Natural Gas Co Ltd v Collins and Perkins* [1909] AC 640, PC; *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108, PC; *Shell-Mex and BP Ltd v Belfast Corpn* [1952] NI 72, CA. See also *Brooke v Bool* [1928] 2 KB 578, DC (damage to tenant's property through landlord's negligence while searching for gas leak); and *Sullivan v South Glamorgan County Council* (1985) 84 LGR 415, CA (negligent system of carrying out road works involving gas pipes; explosion from damaged gas pipe causing death). As to the safety provisions relating to the distribution of gas see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 899 et seq.

11 *Midwood & Co Ltd v Manchester Corpn* [1905] 2 KB 597 at 608, CA, per Collins MR; *Miller v South of Scotland Electricity Board* 1958 SLT 229 at 236-237, HL, per Lord Keith of Avonholm (disconnection of electricity services on demolition of house). As to the safety provisions relating to the distribution of electricity see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1152 et seq.

12 See *Scott-Whitehead v National Coal Board* (1985) 53 P & CR 263, where the water authority was held under a duty to warn farmers of the high level of pollutants in a river. The polluter, which acted under a licence, was held not liable on the basis that it was entitled to rely on the water authority giving the necessary warnings. As to the safety provisions relating to waste management see generally **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH**.

13 See notes 9-12.

14 *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108, PC (gas undertakers should have foreseen the possibility of sewer construction beneath their gas main). However, there was no liability for leaving a vehicle unattended with the ignition keys in the lock even though it was reasonably foreseeable that it might be stolen and the thief might drive carelessly thereby endangering other road users: *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, [1992] RTR 254 ('A parked minibus is no more a source of danger than every other vehicle on the road': at 459 and 265 per May J); on appeal [1993] 3 All ER 448, [1993] 1 WLR 976, CA.

15 *Williams v Eady* (1893) 10 TLR 41, CA (youth aged 17 taking bottle of phosphorous); *Sullivan v Creed* [1904] 2 IR 317, Ir CA (boy aged 15 finding loaded gun); *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85, CA (boy of ten tampering with motor coach in car park; no negligence); *Prince v Gregory* [1959] 1 All ER 133, [1959] 1 WLR 177, CA (boy aged 14 throwing mortar left in gutter of road; no negligence); cf *Setchell v Snowdon* [1974] RTR 389, CA (owner of a car held not negligent in giving the key to a learner driver on the latter's promise not to drive it). As to the duty of persons who put dangerous articles into the hands of children see PARAS 47 note 13, 50 note 4. As to the liability of parents and persons in charge of children for the torts committed by children see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 28.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(4) DUTY IN RELATION TO GOODS SUPPLIED/47. Nature of duty.

(4) DUTY IN RELATION TO GOODS SUPPLIED

47. Nature of duty.

Independently of any warranty[1], a person who manufactures and sells an article owes a duty to take reasonable care in its design[2] and manufacture[3]. The duty is not limited to articles intended for personal use by way of consumption[4] or external application[5], or as apparel[6], but extends to tools[7] and substances[8] or appliances[9] of any kind, including vehicles[10] and lifts[11]. The duty is owed not only to the ultimate user but to all persons who might reasonably be expected to be affected, such as retailers[12] who handle the article and strangers who are injured by its use[13]. The duty is not to cause injury to person or property[14]. The claimant must prove that on the balance of probabilities it is a reasonable inference to be drawn from the evidence that the defendant was negligent[15] and that his negligence caused the harm[16]. Negligence may be inferred from the existence of defects in the article delivered, taken in conjunction with the other circumstances[17]. Failure to warn of defects discovered since manufacture may also result

in liability[18]. In the absence of an assumption of responsibility, no duty of care will be owed in respect of pure economic loss caused by defects in goods[19].

1 As to implied warranties by vendors see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 69; and as to implied warranties by consignors see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 18.

2 *Hindustan Steam Shipping Co Ltd v Siemens Bros & Co Ltd* [1955] 1 Lloyd's Rep 167 at 177 per Willmer J; *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL.

3 *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL; *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC. For the restrictions imposed by the Unfair Contract Terms Act 1977 s 5 on the freedom of a manufacturer or distributor to exclude or restrict his liability for negligence in his guarantee of the goods see PARA 74.

4 Eg ginger beer (*M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL); drinking water (*Barnes v Irwell Valley Water Board* [1939] 1 KB 21, [1938] 2 All ER 650, CA); or aerated water (*Lockhart v Barr* 1943 SC (HL) 1).

5 Eg hair wash (*George v Skivington* (1869) LR 5 Exch 1; approved in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL); ointment, soap (*M'Alister (or Donoghue) v Stevenson* at 583, HL, per Lord Atkin); or hair dye (*Watson v Buckley, Osborne, Garrett & Co Ltd and Wyrovoys Products Ltd* [1940] 1 All ER 174).

6 *Grant v Australian Knitting Mills Ltd* [1936] AC 85, PC (woollen underwear).

7 *Mason v Williams and Williams Ltd and Thomas Turton & Sons Ltd* [1955] 1 All ER 808, [1955] 1 WLR 549; *Davie v New Merton Board Mills Ltd* [1957] 2 QB 368, [1957] 2 All ER 38 (on appeal on another point [1958] 1 QB 210, [1958] 1 All ER 67, CA; [1959] AC 604, [1959] 1 All ER 346, HL).

8 Eg a cleaning fluid or powder (*M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 583, HL, per Lord Atkin); or a chemical for school experiments (*Kubach v Hollands* [1937] 3 All ER 907).

9 *Smith v London and St Katharine Docks Co* (1868) LR 3 CP 326 (ship's gangway); *Heaven v Pender* (1883) 11 QBD 503, CA (staging); *Dransfield v British Insulated Cables Ltd* [1937] 4 All ER 382 (support for overhead wire).

10 *Donnelly v Glasgow Corpn* 1953 SC 107, Ct of Sess; *Herschtal v Stewart and Ardern Ltd* [1940] 1 KB 155, sub nom *Herschthal v Stewart & Ardern Ltd* [1939] 4 All ER 123; *Lexmead (Basingstoke) Ltd v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL.

11 *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343, [1941] 3 All ER 156, CA. Whether houses and all installations in them are also within the rule is uncertain. The uncertainty derives from the overruling by the House of Lords in *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1975] 3 All ER 1, HL, of *Malone v Laskey* [1907] 2 KB 141, CA, and *Ball v LCC* [1949] 2 KB 159, [1949] 1 All ER 1056, CA, and doubts about the effect of that overruling on *Otto v Bolton and Norris* [1936] 2 KB 46, [1936] 1 All ER 960, which inclined to the view that houses were outside the rule. It is submitted that the courts are now free to bring within the rule articles installed in or upon house property. As to houses themselves, *Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, CA, confirmed that *Bottomley v Bannister* [1932] 1 KB 458, CA, which had conferred an immunity on the vendor of a house, was no longer good law where the vendor was also the builder. See also the Defective Premises Act 1972 s 3 (see PARA 43). However, the immunity established by *Cavalier v Pope* [1906] AC 428, HL, for the bare landlord or vendor, ie one who carelessly supplies the defective property without being involved in design or construction, remains: see PARA 10 note 9.

12 *Barnett v H and J Packer & Co Ltd* [1940] 3 All ER 575.

13 *Stennett v Hancock and Peters* [1939] 2 All ER 578 (injury to passer-by caused by defective repair of motor lorry). See also the following cases where the recipients were children: *Burfitt v A and E Kille* [1939] 2 KB 743, [1939] 2 All ER 372 (sale of pistol and blank cartridges to boy of 12; injury to third person; vendor liable); *Ricketts v Erith Borough Council* [1943] 2 All ER 629 (sale of bow and arrow to boy of ten; third person injured; no negligence on the facts); and cf the cases of gifts or gratuitous loans to children cited in PARA 50 notes 3, 4.

14 *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 599, HL, per Lord Atkin. In the absence of a special relationship between the parties, harm to an economic interest is not protected by the tort of negligence. Hence, the cost of repairing a defect will not normally be recoverable: see *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; and PARA 15.

15 *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 622, HL, per Lord Macmillan; *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 96-97, PC. In *Steer v Durable Rubber Manufacturing Co Ltd* (1958) Times, 20 November, the court inferred negligence by the manufacturer when a hot water bottle burst within three

months after production. See also *Chapronière v Mason* (1905) 21 TLR 633, CA, where a consumer broke his tooth on a stone in a bun; and cf *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283. It is not necessary to specify the particular persons responsible or the acts or omissions which led to the defect in the product: *Carroll v Fearon* [1999] PIQR P416, (1998) Times, 26 January, CA. For an example where the defendants rebutted that inference see *Daniels and Daniels v White & Sons Ltd and Tarbard* [1938] 4 All ER 258, where the defendants were held not liable for the presence of carbolic acid in their lemonade bottle (but see criticism of this case in *Hill v James Crowe (Cases) Ltd* [1978] 1 All ER 812, [1977] 2 Lloyd's Rep 450).

16 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 101, PC.

17 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 101, PC; *Lockhart v Barr* 1943 SC (HL) 1; *Mason v Williams and Williams Ltd and Thomas Turton & Sons Ltd* [1955] 1 All ER 808, [1955] 1 WLR 549.

18 *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189, 40 DLR (3d) 530, Can SC (defective crane; liability for added repair costs due to delay in warning); *Hollis v Dow Corning Corpn* (1993) 103 DLR (4th) 520, BC CA (manufacturer of breast implants liable for failure to warn of risk of rupture).

19 See *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758, [1988] 1 All ER 791, CA; and PARA 15.

48. Intermediate examination or warning.

The duty of care does not arise unless the manufacturer has sold the article in such a form as to show that he intended it to reach the user in the form in which it left him[1] without any reasonable likelihood[2] of such intermediate examination as would have revealed the danger[3]. If there is a risk that the intermediate examination, even if it occurred, could be inadequate, it would seem that both the manufacturer, and the party responsible for the intermediate examination, could be jointly liable to the claimant[4].

The duty of the manufacturer does not arise unless the use to which the article is put is that which he intended[5], or at least not materially different[6]. The manufacturer is not liable if the user in fact had prior knowledge of the defect[7], or if the circumstances would warrant the manufacturer to assume so[8].

1 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 104, PC.

2 The duty is not curtailed by mere physical possibility of intermediate examination unless it is in practice likely: *Stennett v Hancock and Peters* [1939] 2 All ER 578; *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343 at 363, [1941] 3 All ER 156 at 174, CA, per Scott LJ, and at 376 and 183 per Goddard LJ; *Andrews v Hopkinson* [1957] 1 QB 229 at 236, [1956] 3 All ER 422 at 426 per McNair J. See also *Barnett v H and J Packer & Co Ltd* [1940] 3 All ER 575 (shopkeeper had no opportunity of examining sweets in box when the injury occurred in taking them out); *Davie v New Merton Board Mills Ltd* [1957] 2 QB 368 at 380, [1957] 2 All ER 38 at 44 per Ashworth J (on appeal on another point [1958] 1 QB 210, [1958] 1 All ER 67, CA; [1959] AC 604, [1959] 1 All ER 346, HL) (no intermediate examination of tool between the time of its manufacture and use was reasonably to be expected). An employer who buys tools ready made from a reputable manufacturer or supplier is not expected to examine them for latent defects before issuing them to his employees: *Mason v Williams and Williams Ltd and Thomas Turton & Sons Ltd* [1955] 1 All ER 808, [1955] 1 WLR 549; approved by the House of Lords in *Davie v New Merton Board Mills Ltd* above.

3 *London Graving Dock Co Ltd v Horton* [1951] AC 737 at 750, [1951] 2 All ER 1 at 7, HL, per Lord Porter. Intermediate examination was held to have been probable in *Caledonian Rly Co v Mulholland* [1898] AC 216, HL (railway wagon), as explained in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 at 597, HL, per Lord Atkin; *Farr v Butters Bros & Co* [1932] 2 KB 606, CA (crane); *Otto v Bolton and Norris* [1936] 2 KB 46, [1936] 1 All ER 960 (ceiling defects); *Paine v Colne Valley Electricity Supply Co Ltd and British Insulated Cables Ltd* [1938] 4 All ER 803 (electrical kiosk); *Davis v Foots* [1940] 1 KB 116, [1939] 4 All ER 4, CA (gas connection); *Hindustan*

Steam Shipping Co Ltd v Siemens Bros & Co Ltd [1955] 1 Lloyd's Rep 167 at 178 per Willmer J (ship's telegraph).

4 It has been said that the possibility of intermediate examination would exonerate the manufacturer if, and only if, he had reason to believe that whoever carried out any subsequent examination would use the opportunity to indicate the risk and warn subsequent users: see *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217 at 222 per Chapman J. Cf *Aswan Engineering Establishment Co v Lupdine Ltd (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135 at 153-154, [1987] 1 WLR 1 at 22-23, CA, per Lloyd LJ (there was no independent requirement for the plaintiff to show that there was no reasonable possibility of intermediate examination; rather it was simply an important factor that the court had to consider in determining whether the damage was reasonably foreseeable).

5 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 104, PC. A product could not be said to be defective if it was misused, eg a car tyre fitted to a bus: see *Aswan Engineering Establishment Co v Lupdine Ltd (Thurgar Bolle Ltd, third party)* [1987] 1 All ER 135 at 154, [1987] 1 WLR 1 at 23, CA, per Lloyd LJ.

6 *Davie v New Merton Board Mills Ltd* [1957] 2 QB 368 at 379, [1957] 2 All ER 38 at 44 per Ashworth J (on appeal on another point [1958] 1 QB 210, [1958] 1 All ER 67, CA; [1959] AC 604, [1959] 1 All ER 346, HL); cf *Devilez v Boots Pure Drug Co Ltd* (1962) 106 Sol Jo 552, where the defendants were held liable when the plaintiff was injured through accidentally dropping their corn solvent onto his testicles, because they had not warned of the danger to normal skin.

7 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 105, PC; *Farr v Butters Bros & Co* [1932] 2 KB 606, CA; *McTear v Imperial Tobacco Ltd* (2005) Times, 14 June, OH (tobacco manufacturer owed no duty to consumer who contracted lung cancer because health risks of smoking well known). However, the manufacturer will remain liable if the user, having taken reasonable, but unsuccessful, steps to diagnose the cause of problems, continued using the product which then caused damage: *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854, [1992] 1 WLR 498.

8 *London Graving Dock Co Ltd v Horton* [1951] AC 737 at 750, [1951] 2 All ER 1 at 7, HL, per Lord Porter. See *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854, [1992] 1 WLR 498, where the defect in question could not have been discovered with reasonable care by the user of the product.

49. Persons liable.

The duty of care is not confined strictly to manufacturers, but extends to the operations of those who for reward assemble[1] or repair[2] articles. It extends to retailers who have to perform some work on the goods other than mere distribution[3], including those checks which a retailer of the goods in question would reasonably be expected to make[4].

1 *Malfroot v Noxal Ltd* (1935) 51 TLR 551 (motor cycle); *Howard v Furness Houlder Argentine Lines Ltd and A and R Brown Ltd* [1936] 2 All ER 781 (steam valve).

2 *Stennett v Hancock and Peters* [1939] 2 All ER 578 (lorry); *Herschtal v Stewart and Ardern Ltd* [1940] 1 KB 155, sub nom *Herschthal v Stewart & Ardern Ltd* [1939] 4 All ER 123 (car); *Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343, [1941] 3 All ER 156, CA (lift). It includes suppliers of water: *Read v Croydon Corpn* [1938] 4 All ER 631; *Barnes v Irwell Valley Water Board* [1939] 1 KB 21, [1938] 2 All ER 650, CA. A person repairing may be under a duty to give warning of any defects likely to make the product dangerous: *Nicholson v John Deere Ltd* (1986) 34 DLR (4th) 542; affd (1989) 57 DLR (4th) 639.

3 Eg the motor dealer selling a car reconditioned by him (*Herschtal v Stewart and Ardern Ltd* [1940] 1 KB 155, sub nom *Herschthal v Stewart & Ardern Ltd* [1939] 4 All ER 123), and the retail chemist who, having been told by the manufacturer to test the product before use, attached the wrong label to the chemical (*Kubach v Hollands* [1937] 3 All ER 907). See also *Prendergast v Sam & Dee Ltd* [1989] 1 Med LR 36, CA, where a pharmacist misread the bad handwriting of a doctor and dispensed the wrong drug to the plaintiff and liability was apportioned 25% to the doctor and 75% to the pharmacist.

4 Thus a car dealer must check the steering of a used car (*Andrews v Hopkins* [1957] 1 QB 229, [1956] 3 All ER 422) even though the sale is on hire purchase through a finance company (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 23 et seq). See also *Fisher v Harrods Ltd* [1966] 1 Lloyd's Rep 500, where a defendant retailer was liable to the donee of a customer for harm to the eyes caused by jewellery cleaning fluid. In *Goodchild v Vaclight* (1965) Times, 22 May, the English distributors of a German vacuum cleaner who compiled an English instruction booklet were liable for a defect. If a garage owner puts a car in an auction, where it is sold 'as seen and with all its faults and without warranty', and he knows that it has a defect which might make it dangerous to drive, the estate of the buyer who is killed through that defect cannot claim against the garage owner in negligence: *Hurley v Dyke* [1979] RTR 265, HL.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(4) DUTY IN RELATION TO GOODS SUPPLIED/50. Articles entrusted to third persons.

50. Articles entrusted to third persons.

A gratuitous transferor, whether by loan or gift, of articles is liable for known dangers of which he does not warn his transferee[1]. A person who is aware of defects in articles which he entrusts to another without warning him of such defects is also liable[2]. If the intended recipient is a child, the defendant is under a duty not to put into his hands any article with which a reasonable person would foresee that the child is likely to injure himself[3] or others[4].

1 *Blakemore v Bristol and Exeter Rly Co* (1858) 8 E & B 1035 at 1051 (loan of crane for heavy lifting); *MacCarthy v Young* (1861) 6 H & N 329 (loan of scaffold). Both these cases were approved in *Coughlin (Goughlin) v Gillison* [1899] 1 QB 145, CA (loan of boiler of donkey engine). See also *Wheeler v Copas* [1981] 3 All ER 405 (loan of ladder for building work). See note 2.

2 *Hodge & Sons v Anglo-American Oil Co* (1922) 12 Ll L Rep 183, CA; *Farrant v Barnes* (1862) 11 CBNS 553. See also *Caledonian Rly Co v Mulholland* [1898] AC 216, HL; *Oliver v Saddler & Co* [1929] AC 584, HL; and *Clarke v Army and Navy Co-operative Society Ltd* [1903] 1 KB 155, CA. In *Hawkins v Coulsdon and Purley UDC* [1954] 1 QB 319 at 333, [1954] 1 All ER 97 at 104, CA, Denning LJ said that there would now be liability in general negligence where a gratuitous transferor ought to have known of the defect, but there is no decision precisely in point; (the nineteenth century cases cited in note 1 are inconsistent with Denning LJ's dictum).

3 *Yachuk v Oliver Blais Co Ltd* [1949] AC 386, [1949] 2 All ER 150, PC (sale of petrol).

4 *Dixon v Bell* (1816) 5 M & S 198 (loaded gun); *Bebee v Sales* (1916) 32 TLR 413, DC (air gun); *Wray v Essex County Council* [1936] 3 All ER 97, CA (oil can; no negligence on the facts); *Donaldson v McNiven* [1952] 2 All ER 691, CA (air rifle; no negligence on the facts); and see *Newton v Edgerley* [1959] 3 All ER 337, [1959] 1 WLR 1031 (gun; negligence on the facts); and *Gorely v Codd* [1966] 3 All ER 891, [1966] 1 WLR 19 (air rifle; adequate parental supervision). See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 26 et seq. As to criminal liability for supplying firearms to minors see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 668-670. As to the liability of persons leaving dangerous things where they are likely to be found by children see PARA 46 note 15.

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(5) NEGLIGENCE IN RELATION TO HIGHWAYS AND PUBLIC PLACES

51. Liability for obstruction.

The placing[1] of an obstacle on a highway or such an improper use of a highway as amounts to an obstruction of the traffic on it constitutes a nuisance at common law[2]. In some cases

obstruction of the highway may be authorised by law[3] or agreement[4]. It may be either temporary[5] or permanent[6]. Where it is temporary, there is a duty, breach of which is an act of negligence, to remove the obstruction as soon as possible[7], and to see that it is so guarded that the risk to persons using the highway is reduced as far as possible[8]. Where it is permanent, there is a duty, breach of which is an act of negligence, to maintain it in such a state of security as persons using the highway have become accustomed to expect[9]. The duty of care extends to blind persons on city streets, even though in the circumstances a sighted person would not have been injured, because the presence of blind persons there is foreseeable[10].

1 A highway authority which constructs a new road under statutory powers may be liable for the negligent creation of an obstruction, both in respect of the negligent exercise of statutory powers (see PARA 17) and in respect of a positive misfeasance as a highway authority: see *Baxter v Stockton-on-Tees Corpn* [1959] 1 QB 441, [1958] 2 All ER 675, CA. Such liability does not extend to the successor as highway authority to the body which constructed the obstruction: *Baxter v Stockton-on-Tees Corpn*.

2 *R v Russell* (1805) 6 East 427; *R v Bartholomew* [1908] 1 KB 554; and see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 322 et seq; **NUISANCE**.

3 Eg in the case of a railway level crossing (see *Caledonian Rly Co v Ogilvy* (1856) 2 Macq 229, HL; *Ellis v London and South Western Rly Co* (1857) 2 H & N 424; *Boyd v Great Northern Rly Co* [1895] 2 IR 555), or of a traffic stud inserted in a highway (see *Skilton v Epsom and Ewell UDC* [1937] 1 KB 112, [1936] 2 All ER 50, CA), or of repairs to the highway itself by the highway authority.

4 Eg in the case of a highway dedicated with an obstruction already existing in it (*Fisher v Prowse* (1862) 2 B & S 770; *Cornwell v Metropolitan Sewers Comrs* (1855) 10 Exch 771), or of a cellar entrance (see note 9), or of beams used for shoring up a house (*Hoare v Kearley* (1885) 1 TLR 426). See further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 131 et seq.

5 Eg where vehicles which, although lawful to be brought on the highway, are left unlighted and obstructing the highway at night (*Evans v Downer & Co Ltd* [1933] 2 KB 465n, CA; *Tidy v Battman* [1934] 1 KB 319, CA; *Scott v M'Intosh* 1935 SC 199, Ct of Sess; *Stewart v Hancock* [1940] 2 All ER 427, PC; *Henley v Cameron* [1949] LJR 989, CA; *Hill-Venning v Beszant* [1950] 2 All ER 1151, CA; *Stevens v Kelland* [1970] RTR 445; *Young v Chester* [1973] RTR 319 (affd [1974] RTR 70, CA); *Lee v Lever* [1974] RTR 35, CA), or in fog (*Harvey v Road Haulage Executive* [1952] 1 KB 120, CA; *Wright v Lodge* [1993] 4 All ER 299, [1993] RTR 123, CA).

6 Eg a flap to an entrance to a cellar (*Pickard v Smith* (1861) 10 CBNS 470), or a flagstone over a cellar (*Scott v Green & Sons* [1969] 1 All ER 849, [1969] 1 WLR 301, CA), or a lamp post near the centre of a widened roadway (*Davies v Carmarthenshire County Council* [1971] RTR 112, CA).

7 *Harris v Mobbs* (1878) 3 Ex D 268. Where a medical man was detained at a level crossing for 20 minutes owing to the unreasonable and negligent failure of a railway employee to open the gates, the railway company was held liable in damages: *Boyd v Great Northern Rly Co* [1895] 2 IR 555.

8 *Foreman v Canterbury Corpn* (1871) LR 6 QB 214 (heap of stones); *Penny v Wimbledon UDC* [1899] 2 QB 72, CA (heap of soil); *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705, HL (manhole); and see the cases of unlighted stationary vehicles cited in note 5. No duty of care is owed by an occupier of premises for hazards left by an independent contractor on the highway where there would have been no liability if the contractors were still carrying out their works: *Rowe v Herman* [1997] 1 WLR 1390, 58 ConLR 33, CA; distinguishing *Penny v Wimbledon UDC* above. Where the obstruction is open and visible and of a normal description, fencing and guarding is not always required (*M'Lelland v Johnstone* (1902) 39 Sc LR 326 (brazier); *Plantza v Glasgow Corpn* 1910 SC 786, Ct of Sess (hydrant)). See further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 247, 389 et seq, 534.

9 Thus entrances to coal chutes and cellars must be kept closed or, when open, must be guarded (*Proctor v Harris* (1830) 4 C & P 337; *Pickard v Smith* (1861) 10 CBNS 470), and the flap or plate must not be kept in a defective condition (*Gandy v Jubber* (1864) 5 B & S 78; on appeal 9 B & S 15, 5 B & S 485, Ex Ch). See also *Osborn v Metropolitan Water Board* (1910) 102 LT 217, doubted in *Rosenbaum v Metropolitan Water Board* (1910) 103 LT 739, CA (cases of projecting stop-cocks). Traffic studs inserted in a highway must not be kept in a defective condition: *Skilton v Epsom and Ewell UDC* [1937] 1 KB 112, [1936] 2 All ER 50, CA. Road signs must not be placed so close to the highway as to endanger users: *Levine v Morris* [1970] 1 All ER 144, [1970] 1 WLR 71, CA. See further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 322 et seq, 559. There is no duty to improve the condition of such works or structures: see *Baxter v Stockton-on-Tees Corpn* [1959] 1 QB 441, [1958] 2 All ER 675, CA; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302 et seq.

10 *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, HL.

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52. Acts of third persons.

An obstruction which, if normally placed on a highway, would be lawful does not render the owner liable if it is tampered with and rendered dangerous by the unforeseeable act of a wrongdoer[1], but a person who places an obstruction necessarily dangerous to users of the highway is not relieved from liability by the intervening act of a third person who moves it from one part of the highway to another[2]. Thus where a lorry was left on the highway, but in such a condition that it could not be set in motion except by four distinct operations, and it was put in motion by a person in mischief the owners were held not liable for the ensuing damage[3]. However, where a car with defective brakes was left on a steep slope on a highway with merely a block of wood under the wheel to hold it and it was interfered with by a boy, liability was held to rest on the owner[4]. A person who voluntarily encounters an obstruction cannot recover if, in so acting, he has exposed himself to such danger as no prudent man would have done[5].

1 *Daniels v Potter and Wing* (1830) 4 C & P 262; *Simpson v Metropolitan Water Board* (1917) 15 LGR 629; cf *Bartlett v Baker* (1864) 3 H & C 153.

2 *Clark v Chambers* (1878) 3 QBD 327; and see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 337.

3 *Ruoff v Long & Co* [1916] 1 KB 148, DC. See also *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, [1993] 1 WLR 976, CA (no liability where a minibus, left unlocked with keys in ignition, was taken by third party who drove into plaintiff).

4 *Martin v Stanborough* (1924) 41 TLR 1, CA. As to the act or intervention of third persons generally see **DAMAGES**.

5 *Clayards v Dethick and Davis* (1848) 12 QB 439 (trench across street); *Thompson v North Eastern Rly Co* (1860) 2 B & S 106 (affd (1862) 2 B & S 119, Ex Ch), both of which cases were applied in *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL.

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53. Use of the highway.

When two persons on the highway are so moving in relation to one another[1] as to involve risk of collision, each owes to the other a duty[2] to move with due care[3], and this is true whether they are both in control of vehicles[4] or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle[5]. The public has a right to proceed by vehicular traffic on the highway, and, if persons or property on or near it are injured by that traffic, the injured person must bear his own loss unless he can establish a breach of duty on the part of some other person[6]. The duty is to use such care as is reasonable, and where a driver is faced with a sudden emergency he can only be expected to do that which an ordinary reasonable man would do[7]. The duty is owed only to such persons as are within the area of potential danger and to whom the defendant could reasonably foresee the risk of injury if he or his employee failed

to exercise care[8]. The defendant may be held responsible where by failure to take care he collides with animals or goods negligently left on the highway[9], or with persons who may be unlawful trespassers towards the owner of the soil of the highway[10]. The ordinary duty of care applies in respect of animals straying on the highway[11].

1 For the general duty of care of carriers to their passengers see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 39 et seq.

2 The cause of action to which this statement is directed is negligence. If personal injury is caused to a claimant as the direct consequence of an act of the defendant, trespass to the person still does not lie in the absence of negligence on the part of the defendant if the injury was caused unintentionally: see *Fowler v Lanning* [1959] 1 QB 426 at 439, [1959] 1 All ER 290 at 297 per Diplock J.

3 See *Lancaster v H B and H Transport Ltd* [1979] RTR 380, CA. A number of road traffic offences are consolidated in inter alia the Road Traffic Act 1988 and regulations made under it: see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 963 et seq. The commission of such an offence is not generally of itself an actionable wrong, although it may be prima facie evidence of negligence on the part of the party in default: *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, CA; *Clarke and Wife v Brims* [1947] KB 497, [1947] 1 All ER 242; *Henley v Cameron* [1949] LJR 989, CA; *West v David Lawson Ltd* 1949 SC 430, Ct of Sess; *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL. However, it is an actionable breach of statutory duty to permit a motor vehicle to be used by an uninsured person (*Monk v Warbey* [1935] 1 KB 75, CA; affd in *McLeod (or Houston) v Buchanan* [1940] 2 All ER 179, HL; and see **INSURANCE** vol 25 (2003 Reissue) PARA 720), or to fail to stop when required at a pedestrian crossing (*London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, HL). As to civil actions for breach of statutory duty see generally **STATUTES**.

4 See *Langley v Dray* [1998] PIQR P314, CA (car driver owes a duty of care to a police officer in pursuit).

5 *Nance v British Columbia Electric Rly Co Ltd* [1951] AC 601 at 611, [1951] 2 All ER 448 at 450, PC. There is also a duty not to leave stationary vehicles in such circumstances as to endanger moving traffic: see PARAS 51 note 5, 59.

6 *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 767, HL, per Lord Blackburn; *Gayler and Pope Ltd v B Davies & Son Ltd* [1924] 2 KB 75 at 82-83 per McCardie J. Both of these cases were approved in *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 244, [1955] 3 All ER 864 at 873, HL, per Lord Tucker). See also *Maitland v Raisbeck and R T and J Hewitt Ltd* [1944] KB 689, [1944] 2 All ER 272, CA.

7 *Parkinson v Liverpool Corpn* [1950] 1 All ER 367, CA.

8 *Hay (or Bourhill) v Young* [1943] AC 92, [1942] 2 All ER 396, HL. The owner of a vehicle owes no duty to passengers whose presence he has neither authorised nor could reasonably have foreseen, if they are injured by his employee's negligent driving: *Twine v Bean's Express Ltd* [1946] 1 All ER 202 (affd 62 TLR 458, CA); *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266, [1951] 1 All ER 363, CA. Cf *Rose v Plenty* [1976] 1 All ER 97, [1976] 1 WLR 141, CA.

9 *Davies v Mann* (1842) 10 M & W 546.

10 *Farrugia v Great Western Rly Co* [1947] 2 All ER 565, CA, where a boy ran along a highway in order to climb onto a moving lorry on which he would be a trespasser. The defendants were held liable for injury caused to the boy by a container falling from the lorry when passing under too low a bridge, even assuming, as was not established on the facts, that he would be a trespasser as against the owner of the soil of the highway at the time when the accident happened.

11 See **ANIMALS** vol 2 (2008) PARA 754.

54. The Highway Code and traffic regulations.

The duties incidental to the exercise of due care on the highway are in part determined by reference to detailed directions published by the Secretary of State for the guidance of road users and known as the 'Highway Code'[1]. A failure on the part of any person to observe any provision of the code may, in any civil proceedings, be relied upon as tending[2] to establish or negative any liability which is in question[3]. Breach of the code does not create a presumption of negligence[4]. Statutes provide for the regulation of traffic by means of traffic signs, including signals[5] and pedestrian crossing places[6], and, even though drivers may clearly be largely or wholly responsible for accidents caused by their negligence in not observing traffic signs[7], if the possibility of danger is reasonably apparent it may also be the duty of other drivers to take precautions against collisions[8]. A driver is under no duty to point out seat belts to passengers[9].

1 Ie the Highway Code (Department of Transport and Driving Standards Agency, 2007 Edn). As to the authority of the Highway Code see further **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221.

2 *Frank v Cox* (1967) 111 Sol Jo 670, CA, where a pedestrian was crossing a road at a junction controlled by traffic lights, having started with the lights in his favour, and was run down by a motorist who had emerged from a side road when the lights turned in his favour. It was held that the motorist was negligent in that he failed to give precedence to a pedestrian who was crossing at a junction as required by the Highway Code.

3 See the Road Traffic Act 1988 s 38(7).

4 See *Powell v Phillips* [1972] 3 All ER 864, CA (pedestrian walking on the nearside of a highway); and *Jarvis v Fuller* [1974] RTR 160, DC.

5 As to the offence of neglecting a traffic direction see the Road Traffic Act 1988 ss 35, 36; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARAS 642-643. At cross roads controlled by signals all drivers should keep a proper look out, and where the signals are defective, they may be liable if their failure to do so causes or contributes to an accident: see *Ramoo Son of Erulapan v Gan Soo Swee* [1971] 3 All ER 320, [1971] 1 WLR 1014, PC.

6 See the Road Traffic Regulation Act 1984 ss 23-25; and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARAS 776-777.

7 *Joseph Eva Ltd v Reeves* [1938] 2 KB 393, [1938] 2 All ER 115, CA; *Ward v LCC* [1938] 2 All ER 341 (traffic signals); *Bailey v Geddes* [1938] 1 KB 156, [1937] 3 All ER 671, CA (pedestrian crossing place); *Tingle, Jacobs & Co v Kennedy* [1964] 1 All ER 888n, [1964] 1 WLR 638n, CA (presumption that lights are in proper working order).

8 *London Passenger Transport Board v Upson* [1949] AC 155 at 171, [1949] 1 All ER 60 at 69, HL, per Lord Wright, and at 173 and 70 per Lord Uthwatt; *Lang v London Transport Executive* [1959] 3 All ER 609, [1959] 1 WLR 1168.

9 *Eastman v South West Thames Regional Health Authority* [1991] RTR 389, [1992] PIQR P42, CA (ambulance driver).

55. Rule of the road.

Drivers of vehicles or riders should keep well to the left side of the highway unless road signs or markings indicate otherwise, or they are about to overtake[1] or turn right, or have to pass stationary vehicles or pedestrians in the road[2]. If two motor vehicles collide in the centre of the road, the inference is, in the absence of evidence enabling the court to draw any other conclusion, that both drivers were equally to blame[3]; and it is not a proper decision to hold that, in the absence of evidence enabling the blame to be fixed upon one driver or the other, no sufficient case has been established against either[4]. It may be negligent to cross a line of stationary traffic to get into the opposite lane direction[5] even if signalled forward by another

driver[6]. Whatever the circumstances, the driver using the wrong side of the road is bound to exercise more care than would be requisite if he were to confine himself to the proper side[7].

1 Special care should be exercised in overtaking a vehicle with left-hand drive (*Daborn v Bath Tramways Motor Co Ltd and Smithey* [1946] 2 All ER 333, CA) or a led horse (*Umphray v Ganson Bros* 1917 SC 371, Ct of Sess). The drivers of emergency or other kindred vehicles owe to the public the same duty of care as any other driver: see *Wardell-Yerburgh v Surrey County Council* [1973] RTR 462.

2 Highway Code para 160. As to the Highway Code see PARA 54 note 1; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221. It has long been settled that a person who is not driving on the left side will usually be held negligent if he meets suddenly and collides with another vehicle on the main road (*Cruden v Fentham* (1798) 2 Esp 685; *Chaplin v Hawes* (1828) 3 C & P 554; *Pluckwell v Wilson* (1832) 5 C & P 375; *Wallace v Bergius* 1915 SC 205, Ct of Sess), or even with one emerging suddenly from a side road (*Dorrington v Griff Fender (Swansea) Ltd* [1953] 1 All ER 1177, [1953] 1 WLR 690, CA). See also *West v Hughes of Beaconsfield Ltd* [1971] RTR 298, where a cyclist turning right was held not to be negligent in moving to the middle of the road.

3 *Baker v Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472, CA; *France v Parkinson* [1954] 1 All ER 739, [1954] 1 WLR 581, CA; *Davison v Leggett* (1969) 133 JP 552, CA, where both motorists were held liable for a head-on collision in the middle lane of a three-lane highway.

4 *Bray v Palmer* [1953] 2 All ER 1449, [1953] 1 WLR 1455, CA.

5 *Worsfold v Howe* [1980] 1 All ER 1028, [1980] 1 WLR 1175, CA.

6 *Garston Warehousing Co Ltd v O F Smart (Liverpool) Ltd* [1973] RTR 377, CA.

7 *Day v Smith* (1983) 133 NLJ 726.

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56. Speed.

The speed at which a vehicle is driven is material to the question of liability. Whether a certain speed will be considered dangerous varies with the nature, conditions and use of the particular highway and the amount of traffic which actually is, or may be expected to be, on it[1]. The driver of a vehicle should usually drive at a speed that will permit him to stop well within the distance he can see is clear[2], although it is not conclusive evidence of negligence to exceed that speed[3]. The question is always one of fact[4], but, if the driver strikes a person or object without seeing that person or object, he may be placed in the dilemma that either he was not keeping a sufficient look out, or that he was driving too fast having regard to the limited look out that could be kept, for example at night[5] or in fog[6]. A driver is not bound to foresee that a vehicle travelling in front of him may stop suddenly without warning or apparent cause[7], and it will usually be negligent so to stop unless urgent cause arises[8].

1 Even though the defendant motorist exceeds the speed limit a court could infer that he was not negligent: *Barna v Hudes Merchandising Corpn* (1962) 106 Sol Jo 194, CA. But see *Grealis v Opuni* [2003] EWCA Civ 177, [2004] RTR 97, [2003] 12 LS Gaz R 32 (defendant motorist negligent in excess of speed limit). As to the duty of care owed by a police motor cyclist when he is exempted from observing a speed limit see *Gaynor v Allen* [1959] 2 QB 403, [1959] 2 All ER 644. See also *Craggy v Chief Constable of Cleveland Police* [2009] All ER (D) 44 (Oct), CA (collision involving emergency vehicles).

2 See the Highway Code para 126. As to the Highway Code see PARA 54 note 1; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221.

3 *Morris v Luton Corpn* [1946] KB 114, [1946] 1 All ER 1, CA.

4 *Tidy v Battman* [1934] 1 KB 319, CA; approved in *Stewart v Hancock* [1940] 2 All ER 427, PC.

5 The driver was held to have been negligent in *Tart v G W Chitty & Co Ltd* [1933] 2 KB 453; *Baker v E Longhurst & Sons Ltd* [1933] 2 KB 461, CA; *Henley v Cameron* [1949] LJR 989, CA; *Hill-Venning v Beszant* [1950] 2 All ER 1151, CA; *Lee v Lever* [1974] RTR 35, CA. The driver was held not to have been negligent in *Evans v Downer & Co Ltd* [1933] 2 KB 465n, CA; *Tidy v Battman* [1934] 1 KB 319, CA; *Scott v M'Intosh* 1935 SC 199, Ct of Sess; *Stewart v Hancock* [1940] 2 All ER 427, PC; *Morris v Luton Corpn* [1946] KB 114, [1946] 1 All ER 1, CA.

6 See the Highway Code paras 125, 235. See also *Harvey v Road Haulage Executive* [1952] 1 KB 120, CA; and *Wright v Lodge* [1993] 4 All ER 299, [1993] RTR 123, CA.

7 *Croston v Vaughan* [1938] 1 KB 540, [1937] 4 All ER 249, CA. However, the driver of the vehicle behind may be negligent if he drives too close and cannot pull up in time when the vehicle ahead brakes suddenly: *Thompson v Spedding* [1973] RTR 312, CA. See also *Parnell v Metropolitan Police District Receiver* [1976] RTR 201, [1975] 1 Lloyd's Rep 492, CA; and *Patel v Edwards* [1970] RTR 425, CA. The question is always one of fact: *Scott v Warren* [1974] RTR 104, DC.

8 *Gussman v Gratton-Storey* (1968) 112 Sol Jo 884, CA.

57. Cross roads.

There is an obligation to take special care at cross roads[1]. The driver of a vehicle which approaches a major road from a side road ought to give way to traffic on the major road[2], but the driver of a vehicle on the major road is not absolved from the duty of taking care to avoid collision with a vehicle emerging from a side road[3]. Where there is a collision at cross roads of equal status, there is a guiding rule that the vehicle which has the other on its right hand side must give way[4]. The driver of a vehicle in general owes no duty to traffic entering a light-controlled crossing against the lights. However, a driver has no absolute right to enter a road junction merely because the lights have turned in his favour; he is bound to ensure that it is safe for him to do so[5].

1 See the Highway Code para 181. As to the Highway Code see PARA 54 note 1; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221. As to railway crossings see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 352-366, 405-406.

2 *Macandrew v Tillard* 1909 SC 78; *M'Allester v Glasgow Corpn* 1917 SC 430.

3 *Lang v London Transport Executive* [1959] 3 All ER 609, [1959] 1 WLR 1168; *Watkins v Moffat* (1967) 111 Sol Jo 719, CA. A person driving along a main street is under no duty to drive in such a manner as to be able to stop short should a car be driven straight across out of a side road: *Humphrey v Leigh* [1971] RTR 363, CA. See also *Heaton v Herzog* [2008] EWCA Civ 1636, [2009] RTR 381, [2008] All ER (D) 125 (Nov) (driver contributorily negligent as was under continuing duty, when turning right from side road into major road, after looking both ways, to look right).

4 *MacIntyre v Coles* [1966] 1 All ER 723n at 724n, [1966] 1 WLR 831 at 834, CA, per Sellers LJ.

5 *Joseph Eva Ltd v Reeves* [1938] 2 KB 393, [1938] 2 All ER 115, CA; *Radburn v Kemp* [1971] 3 All ER 249, [1971] 1 WLR 1502, CA. See also *Craggy v Chief Constable of Cleveland Police* [2009] All ER (D) 44 (Oct), CA (collision involving emergency vehicles).

58. Pedestrians.

Persons on foot have a right to be on the highway and are entitled to the exercise of reasonable care on the part of persons driving vehicles on it[1], but they must take reasonable care of themselves[2], and may be answerable if they occasion accidents to vehicles[3]. The amount of care reasonably to be required of them depends on the usual and actual state of the traffic[4], and on whether or not the foot passenger is at an approved and indicated pedestrian crossing[5]. A driver owes no special duty to infirm persons on the highway unless he knows or should have known of their infirmity[6].

1 *Craig v Glasgow Corpn* (1919) 35 TLR 214, HL; *Boss v Litton* (1832) 5 C & P 407; and see *Anderson v Blackwood* (1885) 23 Sc LR 227. Merely because a motorist does not see a pedestrian before colliding with him in a dark unlit street does not mean that he is negligent: *Knight v Fellick* [1977] RTR 316, CA.

2 *Kayser v London Passenger Transport Board* [1950] 1 All ER 231; *Cotton v Wood* (1860) 8 CBNS 568; *Hawkins v Cooper* (1838) 8 C & P 473; *Williams v Richards* (1852) 3 Car & Kir 81; *M'Lean v Glasgow Corpn* (1918) 55 Sc LR 619; *Gaffney v Dublin United Tramways Co Ltd* [1916] 2 IR 472, Ir CA. As to contributory negligence see PARA 75 et seq.

3 *Nance v British Columbia Electric Rly Co Ltd* [1951] AC 601 at 611, [1951] 2 All ER 448 at 450-451, PC; *Barry v MacDonald* (1966) 110 Sol Jo 56.

4 *Franklin v Bristol Tramways and Carriage Co Ltd* [1941] 1 KB 255, [1941] 1 All ER 188, CA; *Sparks v Edward Ash Ltd* [1943] 1 KB 223, [1943] 1 All ER 1, CA (both cases of accidents during wartime lighting restrictions).

5 *Williams v Richards* (1852) 3 Car & Kir 81; *Springett v Ball* (1865) 4 F & F 472. If the crossing is an uncontrolled one within the meaning of the Zebra, Pelican and Puffin Pedestrian Crossing Regulations and General Directions 1997, SI 1997/2400, an absolute obligation is imposed on the driver to give precedence to pedestrians on it (*Kozimor v Adey* (1962) 106 Sol Jo 431), although the pedestrian will be contributorily negligent if he steps off the footpath when the vehicle is close to the crossing. See also *Carter v Sheath* [1990] RTR 12, CA. In *Frank v Cox* (1967) 111 Sol Jo 670, CA, a driver turning at a light-controlled crossing hit a pedestrian with the light in his favour, and it was held that the driver's conduct was so monstrous that there was no duty on the pedestrian to guard against that risk. A cyclist pushing a cycle is a 'foot passenger' in relation to crossings: *Crank v Brooks* [1980] RTR 441, DC.

6 A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity: *Hay (or Bourhill) v Young* [1943] AC 92 at 109, [1942] 2 All ER 306 at 405, HL, per Lord Wright. For cases where infirm persons recovered damages see *Stapley v London, Brighton and South Coast Rly Co* (1865) LR 1 Exch 21 (deaf man); and *Daly v Liverpool Corpn* [1939] 2 All ER 142 (slow and elderly woman).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(5) NEGLIGENCE IN RELATION TO HIGHWAYS AND PUBLIC PLACES/59. Defective and unattended vehicles.

59. Defective and unattended vehicles.

Driving a defective vehicle where the defect might reasonably have been discovered is a negligent act[1]. It is negligent to leave a vehicle unattended either on a slope where it runs down of itself[2], or in such special circumstances that the mischievous intervention of a stranger to restart it should have been foreseen[3]. To leave a horse and cart unattended on the highway may be evidence of negligence[4]. To leave a vehicle without lights in a dark road is prima facie evidence of negligence[5].

1 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL. In *Henderson v Henry E Jenkins & Sons* [1970] AC 282, [1969] 3 All ER 756, HL, the sudden failure of brakes on a lorry owing to a corroded pipe in the hydraulic braking system was held to impute negligence to the owners. An MOT certificate will not be sufficient to discharge the burden of showing that reasonable care has been taken in maintaining a car: *Worsley v Hollins* [1991] RTR 252, CA.

2 *Hambrook v Stokes Bros* [1925] 1 KB 141, CA; *Parker v Miller* (1926) 42 TLR 408, CA.

3 *Martin v Stanborough* (1924) 41 TLR 1, CA. However, in *Topp v London Country Bus (South West) Ltd* [1993] 3 All ER 448, [1993] 1 WLR 976, CA, it was held that a driver leaving a vehicle unattended with the ignition keys in the lock was not liable for the negligent driving of a thief and the injuries caused thereby.

4 *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, CA; *Haynes v Harwood* [1935] 1 KB 146, CA; *Aldham v United Dairies (London) Ltd* [1940] 1 KB 507, [1939] 4 All ER 522, CA.

5 *Parish v Judd* [1960] 3 All ER 33 at 37, [1960] 1 WLR 867 at 871 per Edmund Davies J; *Moore v Maxwells of Emsworth Ltd* [1968] 2 All ER 779, [1968] 1 WLR 1077, CA. See also *Butland v Coxhead* (1968) 112 Sol Jo 465; *Chisman v Electromation (Export) Ltd* (1969) 6 KIR 456, CA (plain and obvious negligence to leave a lorry on the wrong side of the road at night with its lights on); and *Watson v Heslop* [1971] RTR 308, CA (negligent parking at night, with a parking light, on a busy, narrow, main road used by traffic travelling at high speed). A motorist, who has to leave his vehicle unlit, may be negligent if he fails to display a warning sign, but this does not absolve other drivers: see *Lee v Lever* [1974] RTR 35, CA; and *Stevens v Kelland* [1970] RTR 445.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(5) NEGLIGENCE IN RELATION TO HIGHWAYS AND PUBLIC PLACES/60. Inference of negligence.

60. Inference of negligence.

The nature of an accident may be such that the mere happening of it is evidence of negligence[1]. Examples are where a motor vehicle without apparent cause leaves the highway[2] or overturns[3], or in fair visibility runs into an obstacle[4], or is suddenly and violently brought to a standstill[5], or swerves[6], or brushes the branches of an overhanging tree[7]. Similarly, it is prima facie evidence of negligence that a vehicle should collide with a street refuge[8], or endanger pedestrians on the pavement either by mounting it[9] or by overhanging and sweeping across it[10]. A prima facie case of negligence by inference from the circumstances is not displaced merely by proof of skidding[11] unless the skid is shown to have happened without fault on the part of the driver[12]. A judge is not bound to make a finding one way or the other with regard to the alleged facts but has a third alternative of finding that the party on whom the burden of proof lies in relation to an allegation has failed to discharge that burden[13].

1 For the application of the maxim res ipsa loquitur see PARA 64 et seq.

2 *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL.

3 *Halliwell v Venables* (1930) 99 LJKB 353, CA; *Liffen v Watson* (1939) 161 LT 351 (on appeal [1940] 1 KB 556, [1940] 2 All ER 213, CA).

4 *Randall v Tarrant* [1955] 1 All ER 600, [1955] 1 WLR 255, CA (stationary vehicle in broad daylight); *Craig v Glasgow Corpn* (1919) 35 TLR 214, HL (man driving cows). A motorist who parks his vehicle in such a position and in such circumstances that he ought reasonably to foresee that other road users who are not keeping a proper look out might collide with it may be held liable in negligence for such a collision: see *Chop Seng Heng v Thevannasan s/o Sinnapan* [1975] 3 All ER 572, PC.

5 *Mars v Glasgow Corpn* 1940 SC 202, Ct of Sess; *Elizabeth v Motor Insurers' Bureau* [1981] RTR 405, CA.

6 *O'Hara v Central SMT Co Ltd* 1941 SC 363, Ct of Sess.

7 *Radley v London Passenger Transport Board* [1942] 1 All ER 433.

8 *Liffen v Watson* (1939) 161 LT 351; on appeal [1940] 1 KB 556, [1940] 2 All ER 213, CA.

9 *Barnes UDC v London General Omnibus Co* (1908) 100 LT 115, DC; *McGowan v Stott* (1923) 143 LT 217, CA; *Ellor v Selfridge & Co Ltd* (1930) 46 TLR 236.

10 *Isaac Walton & Co Ltd v Vanguard Motor Bus Co Ltd* (1908) 25 TLR 13, DC; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152, [1941] 3 All ER 332, CA.

11 *Gibbons v Vanguard Motor Bus Co Ltd* (1908) 72 JP 505, DC; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152, [1941] 3 All ER 332, CA; *Liffen v Watson* (1939) 161 LT 351 (on appeal [1940] 1 KB 556, [1940] 2 All ER 213, CA). In *Richley v Faull (Richley, third party)* [1965] 3 All ER 109, [1965] 1 WLR 1454, it was held that a violent and unexplained skid was evidence of negligence.

12 *Wing v London General Omnibus Co* [1909] 2 KB 652, CA; *Parker v London General Omnibus Co Ltd* (1900) 101 LT 623, CA (driver attempting to avoid pedestrian who stepped into road); *Hunter v Wright* [1938] 2 All ER 621, CA; *Browne v De Luxe Car Services* [1941] 1 KB 549, [1941] 1 All ER 383, CA (dangerous condition of granite setts).

13 See *Carter v Sheath* [1990] RTR 12 at 15, CA, per Mann LJ.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/2. SITUATIONS IN WHICH A DUTY OF CARE ARISES/(5) NEGLIGENCE IN RELATION TO HIGHWAYS AND PUBLIC PLACES/61. Duty to the public in respect of premises.

61. Duty to the public in respect of premises.

An occupier of premises adjoining a highway[1] or other public place[2] is under an obligation to take reasonable care not to injure members of the public, and is liable[3] if, in consequence of failing to exercise such care, a person is injured (1) where the occupier knew or ought reasonably to have known[4] that the premises were in a state likely to cause injury to persons passing by either as a result of dangers on the surface of the highway[5], or as a result of objects falling from above[6]; or (2) where the nature of the occupation of the premises or the acts done by persons upon the premises[7] were such that resultant injury to passers-by on the highway should reasonably have been foreseen[8].

If an injury occurs through the unauthorised interference of a third person causing what would otherwise be safe to become dangerous, an occupier of premises is not liable[9] unless he instigated or ought to have foreseen and provided against such interference[10].

1 *Bolton v Stone* [1951] AC 850 at 860, [1951] 1 All ER 1078 at 1082, HL, per Lord Normand. The occupier will usually be liable in nuisance if he causes injury to such persons. The question of his liability in negligence is material only where the injury is due to some cause not actionable as a nuisance, eg some isolated act not amounting to a continuing state of affairs: *Stone v Bolton* [1950] 1 KB 201 at 205, [1949] 2 All ER 851 at 852, CA, per Singleton LJ, and at 208 and 855 per Jenkins LJ. As to the liability of a person other than an adjoining occupier for the creation of, or failure to remove, dangers on the highway see PARA 51.

2 The duty apparently extends to public places other than highways: see *Pickard v Smith* (1861) 10 CBNS 470 at 479 (railway platform); *Shiffman v Grand Priory in British Realm of Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557 (public park).

3 As to liability in nuisance see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 474; **NUISANCE**.

4 Where all reasonable care has been taken to prevent injury being caused by the state of the premises, and all reasonably probable events have been foreseen and provided against, the occupier is not liable. Thus the occupier of land from which an overhanging tree falls across the highway is not liable if an ordinarily prudent landowner would have been unaware of danger: *Caminer v Northern and London Investment Trust Ltd* [1951] AC 88, [1950] 2 All ER 486, HL. As to the liability in nuisance of the occupier in such a case see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 328. The occupier is under no duty of care in respect of hazards left on the highway by an independent contractor where the works are not carried out under statutory powers and the hazard is not integral to the works: *Rowe v Herman* [1997] 1 WLR 1390, 58 ConLR 33, CA.

5 *O'Keefe v Edinburgh Corpn* 1911 SC 18, Ct of Sess (ice on highway formed by defective public fountain). Defective cellar plates or insufficiently guarded openings upon the highway will usually amount to nuisances (see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 324; **NUISANCE**) but it seems that liability exists in negligence also: see *Pickard v Smith* (1861) 10 CBNS 470 (cellar flap left open); *Braithwaite v Watson* (1889) 5 TLR 331 (insecure cellar plate); *Jewson v Gatti* (1886) 2 TLR 441, CA (insufficient barrier around openings); *Stevenson v Edinburgh Magistrates* 1934 SC 226, Ct of Sess (occupier liable in respect of gap in area railings caused by a car accident).

6 *Kearney v London and Brighton Rly Co* (1871) LR 6 QB 759, Ex Ch (falling brick); *Tarry v Ashton* (1876) 1 QBD 314 (falling lamp); *Beveridge v Kinnear & Co* (1883) 21 Sc LR 260 (faultily secured warehouse door struck and caused to fall by load descending from above); *Palmer v Bateman* [1908] 2 IR 393, CA (falling guttering); *McLoughlin v Warrington Corpn* (1910) 75 JP 57, CA (falling stone); *Williams v McCombie* (1913) 48 L Jo 241 (falling casement window); *Mackie v Dumbartonshire County Council* (1927) 71 Sol Jo 710, HL (falling tree); *Shiffman v Grand Priory in British Realm of Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557 (falling flagpole); *Brown v Harrison* (1947) 63 TLR 484, CA (fall of dying tree); but see note 4. '[T]he safety of the public must take precedence over the preservation of the amenities and [I] cannot hold that the [National] Trust's duty to care for the countryside diminishes to any degree the duty not to subject users of this highway to unnecessary danger': *Quinn v Scott* [1965] 2 All ER 588 at 593, [1965] 1 WLR 1004 at 1012 per Glyn Jones J. See also *Bedman v Tottenham Local Board of Health* (1887) 4 TLR 22 (dangerous, low archway leading from highway to private road held substantially to form part of highway); *Evans v Edinburgh Corpn* [1916] 2 AC 45, HL (no negligence by occupier suddenly to open outwards a door on to the highway). Where the fall of an object is the result of a dangerous state of affairs as contrasted with an isolated act it will usually amount to a nuisance: see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 328; **NUISANCE**.

7 *Reedie v London and North Western Rly Co* (1849) 4 Exch 244 (fall of a stone intended for building operations); *Byrne v Boadle* (1863) 2 H & C 722 (fall of bale of goods); *Taylor v Dick* 1897 4 SLT 297 (rifle shots); *Walsh v Holst & Co Ltd* [1958] 3 All ER 33, [1958] 1 WLR 800, CA (falling brick); *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL (driver killed swerving to avoid a child running from a playground); *Hilder v Associated Portland Cement Manufacturers Ltd* [1961] 3 All ER 709, [1961] 1 WLR 1434 (driver injured by a ball kicked from field on which defendants allowed children to play). See also the cases cited in note 8. See also *Briggs v Oliver* (1866) 4 H & C 403 (packing case placed on public pavement); *Watson v Ellis* (1885) 1 TLR 317; *De Teyron v Waring* (1885) 1 TLR 414 (both cases where carpets were placed on the public pavement). As to the failure of an owner or occupier of land adjoining a highway to prevent his animals from straying on to the highway see **ANIMALS** vol 2 (2008) PARA 754. As to the liability of an occupier of land who stores or uses explosives see **EXPLOSIVES** vol 17(2) (Reissue) PARA 901; **NUISANCE**.

8 *McDowall v Great Western Rly Co* [1903] 2 KB 331, CA (no liability where trespassing boys caused defendant's trucks to run away and cross a highway); *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078, HL (cricket ball struck from adjoining ground; injury to passer-by not reasonably foreseeable). See also *Ward v Abraham* 1910 SC 299, where it was held not negligent to play cricket near neighbour's premises; and see note 4.

9 *McDowall v Great Western Rly Co* [1903] 2 KB 331, CA; *Murphy v Smith* (1886) 23 Sc LR 709 (occupier not liable for unauthorised forcible interference with sliding door to a yard; the groove had become blocked); cf *Beveridge v Kinnear & Co* (1883) 21 Sc LR 260 (occupier liable where a faultily secured door was thrown into the street by being hit with a bale of goods lowered from a third person's warehouse). As to the effect of intervening acts by third persons see generally **DAMAGES**.

10 *Rickards v Lothian* [1913] AC 263, PC; *Wheeler v Morris* (1915) 84 LJKB 1435, CA; *Braithwaite v Watson* (1889) 5 TLR 331, where it was held to be negligent to leave a cellar plate unsecured so that a third person could move it; and see the cases cited in note 5. If the occupier knew or ought to have known of the altered and dangerous condition he may be liable in nuisance. As to the duty of a trial judge to make thorough findings of fact on which to base a determination of whether a local authority owed a duty of care in respect of injuries sustained by a passer-by to a building site see *Gabriel v Kirklees Metropolitan Council* [2004] EWCA Civ 345, [2004] BLR 441, [2004] All ER (D) 462 (Mar). As to liability for nuisances created by third persons see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 338; **NUISANCE**.

3. PROVING NEGLIGENCE

(1) THE BURDEN OF PROOF

62. Proving negligence.

The burden of proof[1] in a claim for damages for negligence rests primarily on the claimant[2], who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible[3]. This involves the proof of some duty owed by the defendant to the claimant[4], some breach of that duty[5], and an injury to the claimant between which and the breach of duty a causal connection must be established[6]. Therefore, it is insufficient for the claimant to prove a breach of duty to a third person[7], or a breach of duty without proving injury[8], or to prove injury without proving a breach of duty[9], or injury which may or may not be caused by a breach of duty[10]. Nevertheless, policy considerations may sometimes come to the assistance of the claimant if the limits of scientific knowledge prevent him from establishing conclusively which of several tortfeasors, all of whom had been in breach of duty, had actually been responsible for triggering the harm[11].

Where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a prima facie case which it will then be for the defendant to rebut[12].

1 As to the burden of proof generally see **CIVIL PROCEDURE** vol 11 (2009) PARAS 769-774.

2 The claimant must similarly prove negligence if, having suffered direct injury, he relies upon unintentional trespass: *Fowler v Lanning* [1959] 1 QB 426, [1959] 1 All ER 290. It is because the burden of proving negligence is on the claimant that there is no defence of inevitable accident, properly so-called, and judgments in actions of negligence no longer contain the expression; in such cases the defendant is merely denying the claimant's plea that he was negligent.

3 *Hammack v White* (1862) 11 CBNS 588; *Manzoni v Douglas* (1880) 6 QBD 145. See also *Pickford v Imperial Chemical Industries plc* [1998] 3 All ER 462, [1998] 1 WLR 1189, HL (plaintiff failed to prove injury caused by work activities). A defendant should not be permitted to rely on his own wrongdoing to break the chain of causation: *Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Brothers (a firm)* [2003] EWCA Civ 215, (2004) Times, 24 March, [2004] All ER (D) 458 (Feb); followed in *H M Prison Service v Beart (No 2)* [2005] EWCA Civ 467, [2005] ICR 1206, [2005] IRLR 568.

4 *Heaven v Pender* (1883) 11 QBD 503 at 507, CA, per Brett MR.

5 See PARA 21 et seq. Where negligence is alleged, the facts to be set out must be those which show a duty to take reasonable care and in what respects that duty has been disregarded: see *Gautret v Egerton* (1867) LR 2 CP 371 at 374; approved in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, DC. For examples of the limits to be placed on the particulars of negligence which must be pleaded see *Logue v British Thomson-Houston Co Ltd* [1956] NI 179.

6 *Robinson v Post Office* [1974] 2 All ER 737, [1974] 1 WLR 1176, CA; *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL; *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL; *Reay v British Nuclear Fuels plc* [1994] PIQR P171, [1994] 5 Med LR 1. Where two competing causes of damage exist, a tortious act will not be taken to have caused the damage unless it is known to be capable of causing that damage: *Kay v Ayrshire and Arran Health Board* [1987] 2 All ER 417, HL. See **DAMAGES**.

7 *Hay (or Bourhill) v Young* [1943] AC 92, [1942] 2 All ER 396, HL.

8 *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243.

9 See *Lovegrove v London, Brighton and South Coast Rly Co* (1864) 16 CBNS 669 at 692 per Willes J.

10 *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL.

11 See *Fairchild v Glenhaven Funeral Services Ltd; Fox v Spousal (Midland) Ltd; Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305 in which limitations on scientific evidence making it impossible to prove which of several periods of negligent asbestos exposure, by different employers, had actually triggered the claimant's resulting mesothelioma, did not prevent each of the employers from being liable. Moreover, the liability of the negligent employers in such mesothelioma cases is joint and several (see the Compensation Act 2006 s 3 reversing *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785).

12 See *Farrell v Snell* (1990) 72 DLR (4th) 289, Can SC, where it was held that the court may draw inferences from the evidence, based on common sense. See also *Clark v MacLennan* [1983] 1 All ER 416; cf *Wilsher v Essex Area Health Authority* [1987] QB 730 at 753, [1986] 3 All ER 801 at 815, CA, per Mustill LJ (on appeal [1988] AC 1074, [1988] 1 All ER 871, HL).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(1) THE BURDEN OF PROOF/63. Negligence of the claimant.

63. Negligence of the claimant.

It is for the claimant to prove on the balance of probabilities facts from which the proper inference is that the injury complained of was the result of the defendant's negligence[1]. If the claimant only establishes facts which are equally consistent with the accident being the result of his own or the defendant's negligence, he cannot succeed[2]. He cannot recover when the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the defendant's negligence[3]. However, if negligence on the defendant's part which might have caused the injury is established, it may be sufficient for the claimant to prove facts which show a greater likelihood that the injury was caused by the defendant's negligence than his own[4]. It is not necessary for him in the first instance to prove that there was no negligence on his part[5], unless, from the other facts which he proves, the inference that he alone was negligent could as properly be drawn[6].

The burden of proving that he was not negligent himself may be subsequently placed on him by the evidence given on behalf of the defendant[7]. If the acts of both parties are negligent and come closely together, the claimant must prove that the defendant's act was a direct cause of the injury although not necessarily that the defendant had the last opportunity of avoiding it[8]. If the evidence shows that the claimant's negligence was subsequent to that of the defendant, the claimant can succeed only if he shows that his act did not supersede the direct consequences of the defendant's act so as to prevent its being a cause of the injury[9].

1 *Bettany v Waine* (1885) 1 TLR 588, DC, citing *Wakelin v London and South Western Rly Co* (1884) [1896] 1 QB 189n at 193n, CA, per Bowen LJ (on appeal (1886) 12 App Cas 41, HL).

2 *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41, HL; *Craig v Glasgow Corpn* (1919) 35 TLR 214 at 216, HL, per Lord Finlay; *Jones v Great Western Rly Co* (1930) 47 TLR 39, HL; cf *Pomfret v Lancashire and Yorkshire Rly Co* [1903] 2 KB 718, CA; *Reynolds v Thomas Tillings Ltd* (1903) 19 TLR 539; *Morgan v Sim, The London* (1857) 11 Moo PCC 307 at 311; *Russell v London and South Western Rly Co* (1908) 24 TLR 548, CA; *Ramage and Ferguson v Forsyth* (1890) 28 Sc LR 26; *McKenzie v Chilliwack Corpn* [1912] AC 888, PC; *Cole v De Trafford (No 2)* [1918] 2 KB 523, CA; *Mersey Docks and Harbour Board v Procter* [1923] AC 253, HL; *Moore v R Fox & Sons* [1956] 1 QB 596, [1956] 1 All ER 182, CA, explaining *The Kite* [1933] P 154. Where two vehicles collide in the middle of a road their drivers are, in the absence of evidence justifying any other conclusion, to be treated as equally to blame: see PARA 55.

3 *Muddle v Stride* (1840) 9 C & P 380 (if perils of the sea required a higher degree of care to be taken than was taken, the plaintiff should succeed). See also *Carter v Sheath* [1990] RTR 12, CA.

4 *Fenna v Clare & Co* [1895] 1 QB 199; *Smith v Midland Rly Co* (1887) 57 LT 813, applying *Harris v Midland Rly Co* (1876) 25 WR 63, DC; *Williams v Great Western Rly Co* (1874) LR 9 Exch 157.

5 See *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 at 47, HL, per Lord Watson; *Dublin, Wicklow and Wexford Rly Co v Slattery* (1878) 3 App Cas 1155, HL.

6 See *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 at 45, HL, per Lord Halsbury LC; *McKenzie v Chilliwack Corpn* [1912] AC 888, PC.

7 See *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 at 47, HL, per Lord Watson; *Barry Rly Co v White* (1901) 17 TLR 644, HL; *SS Heranger (Owners) v SS Diamond (Owners)* [1939] AC 94 at 104, HL,

per Lord Wright; *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 172, [1939] 3 All ER 722 at 735, HL, per Lord Wright. As to contributory negligence generally see PARA 75 et seq.

8 *Swadling v Cooper* [1931] AC 1, HL; *Boy Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140, sub nom *Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* [1947] 2 All ER 350, HL; and see PARA 75 et seq.

9 *The Ovingdean Grange* [1902] P 208, CA. As to causation see also **DAMAGES** vol 12(1) (Reissue) PARA 854.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(2) RES IPSA LOQUITUR/64. Inference of defendant's negligence.

(2) RES IPSA LOQUITUR

64. Inference of defendant's negligence.

Under the doctrine res ipsa loquitur[1] a claimant establishes a prima facie case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the claimant's safety[2]. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care[3].

1 Ie the facts speak for themselves.

2 See *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240 at 1246, [1971] 1 WLR 749 at 755, CA, per Megaw LJ; *Turner v Mansfield Corpn* (1975) 119 Sol Jo 629, CA.

3 *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596, Ex Ch. The claimant cannot rely upon an inference of negligence unless he has alleged in the pleadings and proved at the trial the facts from which the inference is to be drawn: *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218, [1955] 3 All ER 864, HL, where the plaintiffs alleged that the grounding of a ship by which they were injured was the result of negligent navigation by the master and it was found by the trial judge that the ship grounded owing to a fracture of the stern frame which upset her steering and not owing to negligent navigation. It was held that it was not open to the plaintiffs on their allegations at the trial to contend in the alternative that the very event of the fracture and grounding showed the ship to have been unseaworthy. It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable: *Bennett v Chemical Construction (GB) Ltd* [1971] 3 All ER 822, [1971] 1 WLR 1571, CA.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(2) RES IPSA LOQUITUR/65. Absence of explanation.

65. Absence of explanation.

The maxim res ipsa loquitur[1] applies only where the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident. If the causes are sufficiently known the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred[2]. Where the defendant does give evidence relating to the possible cause of the damage and

level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine[3].

1 See PARA 64 note 1.

2 See *Barkway v South Wales Transport Co Ltd* [1950] AC 185, [1950] 1 All ER 392, HL, where the tyre of a bus burst and the bus mounted the pavement and fell down an embankment; res ipsa loquitur did not apply because the court had evidence of the circumstances of the accident and the negligent system of tyre inspection in the defendant's garage. See also *Bolton v Stone* [1951] AC 850 at 859, [1951] 1 All ER 1078 at 1081, HL, per Lord Porter; *Roe v Minister of Health* [1954] 2 QB 66, [1954] 2 All ER 131, CA; *McArthur v Dominion Cartridge Co* [1905] AC 72, PC; *Farrell v Limerick Corpn* (1911) 45 ILT 169; *Flannery v Waterford and Limerick Rly Co* (1877) IR 11 CL 30; *Brophy v J C Bradfield & Co Ltd* [1955] 3 All ER 286, [1955] 1 WLR 1148, CA. A claimant who is able to present a partial account of how an accident happened is still not precluded from relying on res ipsa loquitur for further inferences essential to the winning of his case; the partial explanation may make it more obvious that an inference of negligence can be drawn: see *Ballard v North British Rly Co* 1923 SC (HL) 43 at 54 per Lord Dunedin. Of course, even if res ipsa loquitur is inapplicable because all the material facts are proved, those facts may be found to constitute negligence: see eg *Barkway v South Wales Transport Co Ltd* above.

3 *Henderson v Henry E Jenkins & Sons* [1970] AC 282, [1969] 3 All ER 756, HL (failure of lorry's brakes; generally accepted procedures for servicing had been followed; nevertheless, the degree of corrosion suggested an abnormal cause and the inference of negligence had not been displaced). See also *Ludgate v Lovett* [1969] 2 All ER 1275, [1969] 1 WLR 1016, CA; *Drake v Harbour* [2008] EWCA Civ 25, 121 ConLR 18, [2008] All ER (D) 283 (Jan).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(2) RES IPSA LOQUITUR/66. Control.

66. Control.

In order that the maxim res ipsa loquitur[1] should apply the defendant must be in control of the thing which causes the accident[2]. It is not always essential that the defendant be in complete control of all the circumstances, provided that the happening of the accident is evidence of negligence on the part of the defendant or someone for whom he is responsible[3]. If the instrumentality is in the control of one of several employees of the same employer, and the claimant cannot point to the particular employee who is in control, the rule may still be invoked so as to make the employer vicariously liable[4].

1 See PARA 64 note 1.

2 *Turner v Mansfield Corpn* (1975) 119 Sol Jo 629, CA, where the plaintiff driver of the defendant's dust cart was injured when its back raised itself up as he drove it under a bridge. It was held that because the plaintiff was in control and yet could furnish no evidence from which negligence by the defendants could be inferred, he failed. See also *Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, where a few minutes after a train started the door flew open and the plaintiff fell out, and it was held that there was evidence of negligence by the railway company; cf *Easson v London and North Eastern Rly Co* [1944] KB 421, [1944] 2 All ER 425, CA, where the plaintiff failed because the doors of an express corridor train are not continuously under the railway company's control. Cf *Drake v Harbour* [2008] EWCA Civ 25, 121 ConLR 18, [2008] All ER (D) 283 (Jan) (liability imposed upon negligent electrician in control of a house for a fire which broke out in his absence even though the exact mechanism which led to the fire was not fully identified).

3 *McGowan v Stott* (1923) in (1930) 99 LJKB 357n, where the doctrine was held applicable to highway accidents where the defendant was in charge of the vehicle causing the damage. The defendant's control need only exist at the time of the hypothetical negligence (eg during the manufacture of a product) rather than the time of the accident or injury; but where the product could have been interfered with by persons other than the defendant between manufacture and accident, the claimant must establish the improbability of such interference having caused the relevant defect before he can invoke res ipsa loquitur: *Lloyde v West Midlands Gas Board* [1971] 2 All ER 1240, [1971] 1 WLR 749, CA (gas apparatus in plaintiff's house exploded).

4 *Cassidy v Ministry of Health* [1951] 2 KB 343, [1951] 1 All ER 574, CA. If a surgeon is shown to be in general command of an operation, and the patient cannot establish whether it was the malpractice of the surgeon or one of the theatre staff which inflicted damage on him in the course of that operation, it seems that res ipsa loquitur applies in an action of negligence against the surgeon: see *Mahon v Osborne* [1939] 2 KB 14, [1939] 1 All ER 535, CA. If on the other hand, the surgeon is not in control of all the relevant stages of treatment, and if the claimant cannot prove that the act complained of took place at a time when the defendant surgeon was in control, res ipsa loquitur cannot be relied on: *Morris v Winsbury-White* [1937] 4 All ER 494; cf *Roe v Minister of Health* [1954] 2 QB 66 at 80, [1954] 2 All ER 131 at 135, CA, per Somervell LJ. In *Walsh v Holst & Co Ltd* [1958] 3 All ER 33, [1958] 1 WLR 800, CA, the doctrine was extended further: when the defendant's duty is so extensive that he is answerable for the negligence of his independent contractor, and an accident occurs while the independent contractor is performing the work delegated to him, the claimant can invoke res ipsa loquitur against both the defendant and his independent contractor. Cf *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, [2009] All ER (D) 158 (Nov) (the duty to take reasonable care might be discharged by entrusting the performance of a task to an apparently competent independent contractor).

Whether the maxim res ipsa loquitur applies, when a thing or operation is under the control of two persons not in law responsible for each other, is questionable: see *Roe v Minister of Health* above.

UPDATE

66 Control

NOTE 4--*Farraj*, cited, reported at (2009) 111 BMLR 131.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(2) RES IPSA LOQUITUR/67. Occurrences that cannot happen without carelessness.

67. Occurrences that cannot happen without carelessness.

The harm must be of such a kind that it does not ordinarily happen if proper care is being taken. The doctrine of res ipsa loquitur[1] has been applied to things falling from buildings[2], and to accidents resulting from defective machines, apparatus or vehicles[3]. It has also been applied where motor cars mount the pavement[4] or where aircraft crash on taking off[5]. On the other hand, it was held inapplicable where a fire, having been left by a lodger in his grate, spread from his room and damaged neighbouring rooms[6]. Even though the matter is not one of common experience, where an unexplained accident occurs from a thing under the defendant's control, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for the court[7].

1 See PARA 64 note 1.

2 *Byrne v Boadle* (1863) 2 H & C 722 (flour barrel falling from upper window onto plaintiff walking on the street below); *Kearney v London and Brighton Rly Co* (1871) LR 5 QB 411 (affd (1871) LR 6 QB 759); *Bennett v Chemical Construction (GB) Ltd* [1971] 3 All ER 822, [1971] 1 WLR 1571, CA (panel falling on workman); *Kealey v Heard* [1983] 1 All ER 973, [1983] 1 WLR 573 (planks on scaffolding collapsed).

3 *Ballard v North British Rly Co* 1923 SC (HL) 43 (defective coupling on train). The doctrine only applies, however, if the defendant has control of the thing causing the accident: see PARA 66.

4 *McGowan v Stott* (1923) in (1930) 99 LJKB 357n, CA; *Ellor v Selfridge & Co Ltd* (1930) 46 TLR 236; *Laurie v Raglan Building Co Ltd* [1942] 1 KB 152, [1941] 3 All ER 332; *Watson v Thomas S Whitney & Co Ltd* [1966] 1 All ER 122, [1966] 1 WLR 57, CA (car door handle projecting over a pavement caught a pedestrian's sleeve). See, however, PARA 65.

5 *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108. See also *George v Eagle Air Services Ltd* [2009] UKPC 21, [2009] 1 WLR 2133, [2009] All ER (D) 33 (Aug) (landing). Of the many other cases see eg *Chapronière v Mason* (1905) 21 TLR 633, CA (stone in bun); *Grant v Australian Knitting Mills*

Ltd [1936] AC 85, PC (excess of sulphites in woollen pants); *Skinner v London, Brighton and South Coast Rly Co* (1850) 5 Exch 787 (trains colliding); *Angus v London, Tilbury and Southend Rly* (1906) 22 TLR 222, CA (train stopping jerkily); *The Valdes* (1914) 31 TLR 144 (ship running down ship at anchor). See also *Zerka v Lau-Goma Airways* (1960) 23 DLR (2d) 145, Ont CA.

6 *Sochacki v Sas* [1947] 1 All ER 344. See also *Pritchard v Clwyd County Council* [1993] PIQR P21, CA (collection of floodwater on highway did not give rise to res ipsa loquitur).

7 *Mahon v Osborne* [1939] 2 KB 14, [1939] 1 All ER 535, CA (swabs left in patient's body after operation); *Cassidy v Ministry of Health* [1951] 2 KB 343, [1951] 1 All ER 574, CA; *Saunders v Leeds Western Health Authority* (1984) 129 Sol Jo 225, [1993] 4 Med LR 355 (cardiac arrest of a patient under anaesthesia). But see *Delaney v Southmead Hospital Authority* (1992) 26 BMLR 111, [1995] 6 Med LR 555, CA, where the application of res ipsa loquitur to an anaesthesia incident was rebutted by evidence that common practice had been followed; and it was doubted that the maxim was of much help in medical negligence cases (at 118 per Stuart-Smith LJ); medical science is not such a precise science that there cannot be any room for the wholly unexpected result occurring in the human body from the carrying out of a well-recognised procedure (at 120 per Dillon LJ).

As to where there is some explanation of how an accident happened see PARA 65.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/3. PROVING NEGLIGENCE/(2) RES IPSA LOQUITUR/68. Effect of application of maxim res ipsa loquitur.

68. Effect of application of maxim res ipsa loquitur.

Where the claimant successfully alleges res ipsa loquitur[1] its effect is to furnish evidence of negligence on which a court is free to find for the claimant[2]. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable[3]. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability[4]. However, it seems that the maxim does not reverse the burden of proof, so that where the defendant provides a plausible explanation without proving either of those matters, the court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference[5].

1 See PARA 64 note 1.

2 See *Ballard v North British Rly Co* 1923 SC (HL) 43 at 54; *McGowan v Stott* (1923) in (1930) 99 LJKB 357n; *Cole v De Trafford (No 2)* [1918] 2 KB 523 at 528, CA, per Pickford LJ. The cogency of the inference of negligence varies from case to case; sometimes, but not always, the circumstances may be such that the inference of negligence is irresistible, whereas in others it may be less powerful so that a court is free to find for the defendant: see *Easson v London and North Eastern Rly Co* [1944] KB 421 at 425, [1944] 2 All ER 425 at 430, CA, per du Parcq LJ; *Turner v Mansfield Corpn* (1975) 119 Sol Jo 629, CA. Cases such as *Moore v R Fox & Sons* [1956] 1 QB 596, [1956] 1 All ER 182, CA, and *Ludgate v Lovett* [1969] 2 All ER 1275, [1969] 1 WLR 1016, CA, must not be taken as deciding that res ipsa loquitur always creates an irrebuttable presumption of negligence in the absence of evidence from the defendant.

3 *Colvilles Ltd v Devine* [1969] 2 All ER 53, [1969] 1 WLR 475, HL. See also PARA 65.

4 *Woods v Duncan* [1946] AC 401, [1946] 1 All ER 420n, HL; *Walsh v Holst & Co Ltd* [1958] 3 All ER 33, [1958] 1 WLR 800, CA; *Swan v Salisbury Construction Co Ltd* [1966] 2 All ER 138, [1966] 1 WLR 204, PC; *Worsley v Hollins* [1991] RTR 252, CA.

5 *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298, PC; cf *Henderson v Henry E Jenkins & Sons* [1970] AC 282, [1969] 3 All ER 756, HL; *Ward v Tesco Stores Ltd* [1976] 1 All ER 219, [1976] 1 WLR 810, CA. See also *Ratcliffe v Plymouth & Torbay Health Authority* [1998] Lloyd's Rep Med 162, [1998] PIQR P 170, CA (medical negligence).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(1) ASSUMPTION OF RISK/69. Nature of defence.

4. DEFENCES

(1) ASSUMPTION OF RISK

69. Nature of defence.

Where a claimant relies on the breach of a duty to take care owed by the defendant to him, it is a good defence that the claimant consented[1] to that breach of duty[2], or, knowing of it, voluntarily incurred the whole risk entailed by it[3]. In such a case the defence of assumption of risk, traditionally expressed in the maxim volenti non fit injuria, applies[4]. This defence is to be distinguished from the plea of contributory negligence, for a claimant may have voluntarily exposed himself to the risk of being injured while himself exercising the utmost care for his own safety[5]; and, conversely, while knowledge of the risk may show contributory negligence, it does not prove voluntary assumption of risk[6].

1 The common duty of care imposed by statute upon occupiers of premises does not extend to risks willingly accepted as his by the visitor: see the Occupiers' Liability Act 1957 s 2(5); *M'Glone v British Railways Board* 1966 SC (HL) 1; and PARA 34.

2 Strictly the plea is a denial of any duty at all and, therefore, of any breach of duty: see *Dann v Hamilton* [1939] 1 KB 509 at 512, [1939] 1 All ER 59 at 60 per Asquith J.

3 See *Thomas v Quartermaine* (1887) 18 QBD 685 at 696, CA, per Bowen LJ (approved in *Yarmouth v France* (1887) 19 QBD 647 at 659, DC, per Lindley LJ; and in *Smith v Baker & Sons* [1891] AC 325 at 337, HL, per Lord Halsbury LC). It has been said that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he and not the party alleged to be negligent should bear the loss in the event of injury; in other words, the consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk: see *Kelly v Farrans Ltd* [1954] NI 41 at 45 per Lord Macdermott. Acceptance of the risk must occur either before or at the time of the act or omission that constitutes the negligence: *Sabri-Tabrizi v Lothian Health Board* 1998 SC 373, 1998 SLT 607, Outer House.

4 The maxim is 'volenti' and not 'scienti', ie acceptance of the risk as distinct from mere knowledge of it. A person may know of a danger and be obliged to incur it: *Thrussell v Handyside & Co* (1888) 20 QBD 359; *Thomas v Quartermaine* (1887) 18 QBD 685 at 696, CA, per Bowen LJ; *Membery v Great Western Rly Co* (1889) 14 App Cas 179, HL; *Baker v James* [1921] 2 KB 674 at 683 per McCardie J. See also *Nettleship v Weston* [1971] 2 QB 691 at 701, [1971] 3 All ER 581 at 587, CA, per Lord Denning MR.

5 See *Thomas v Quartermaine* (1887) 18 QBD 685 at 697, CA, per Bowen LJ.

6 *Bill v Short Bros and Harland Ltd* [1963] NI 1, HL; and see *Dawrant v Nutt* [1960] 3 All ER 681, [1961] 1 WLR 253. As to agreements to exclude or limit liability for negligence see PARA 74.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(1) ASSUMPTION OF RISK/70. Application of the defence.

70. Application of the defence.

In order to establish the defence, the claimant must be shown not only to have perceived the existence of danger but also to have appreciated it fully[1] and voluntarily accepted the risk[2]. The question whether the claimant's acceptance of the risk was voluntary is generally one of fact, and the answer to it may be inferred from his conduct in the circumstances. The inference of acceptance is more readily to be drawn in cases where it is proved that the claimant knew of

the danger and comprehended it[3], for example where the danger was apparent or proper warning was given of it and where there is nothing to show that he was obliged to incur it[4], than in cases where he had knowledge that there was danger but not full comprehension of its extent[5], or where, while taking an ordinary and reasonable course, he had no adequate opportunity of electing whether he would accept the risk[6]. Thus a passenger who travels in a car does not necessarily accept the risk of negligent driving even though he knows that the driver is under the influence of alcohol[7] or is a learner[8].

Where the relationship of employer and employee exists the defence of volenti non fit injuria is theoretically available[9] but is unlikely to succeed. If the employee was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred[10]. Owing to his contract of employment an employee is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer. Where the action is against any person other than the employer it may also be argued that the defence does not apply because, although the contract of employment is of no concern to that other person, the employee had no choice in the matter[11].

The maxim volenti non fit injuria will not apply if the act which results in injury is done to prevent danger to persons[12] or damage to property[13]. Neither will it apply where the negligent act of the claimant relied upon is the very act which the defendant was under a duty to prevent, such as actual or attempted suicide by a person in custody[14].

1 *Thomas v Quartermaine* (1887) 18 QBD 685, CA; *Letang v Ottawa Electric Rly Co* [1926] AC 725, PC; *Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101, where the plaintiff fireman was aware only of a small fire and not of another, more deep-seated, nearby. As to passengers in vehicles see PARA 71.

2 *Williams v Birmingham Battery and Metal Co* [1899] 2 QB 338, CA; *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, CA; *Dynen v Leach* (1857) 26 LJ Ex 221; *Smith v Baker & Sons* [1891] AC 325, HL. A fireman (*Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101) or a watchman (*D'Urso v Sanson* [1939] 4 All ER 26) enters a burning building in the course of his duty and is not accepting the risk voluntarily.

3 See *Thomas v Quartermaine* (1887) 18 QBD 685 at 696, CA, per Bowen LJ; *Giles v LCC* (1903) 2 LGR 326. However, such knowledge is no more than evidence of assumption of risk: see *Kelly v Farrans Ltd* [1954] NI 41 at 47 per Lord MacDermott. See also *Baker v James* [1921] 2 KB 674 at 683 per McCardie J.

4 *Torrance v Ilford UDC* (1909) 25 TLR 355, CA, where it was held that a carter had elected to take the risk when he saw and had the opportunity of appreciating the danger involved in driving over a road which the defendant had covered with a large quantity of granite, yet drove on, with the result that his horse was injured; *Sylvester v Chapman Ltd* (1935) 79 Sol Jo 777, where it was held that the plaintiff unnecessarily put his hand near the bars of a leopard's cage.

5 *Smith v Austin Lifts Ltd* [1959] 1 All ER 81, [1959] 1 WLR 100, HL.

6 *Clayards v Dethick and Davis* (1848) 12 QB 439 (approved in *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL); *Thompson v North Eastern Rly Co* (1862) 2 B & S 119; *Osborne v London and North Western Rly Co* (1888) 21 QBD 220, DC (passenger using dangerous steps at a station). See the criticism of freedom to choose as a test in *A C Billings & Sons Ltd v Riden* above at 256 and at 9 per Lord Reid.

7 *Dann v Hamilton* [1939] 1 KB 509, [1939] 1 All ER 59; approved in *Slater v Clay Cross Co Ltd* [1956] 2 QB 264 at 270-271, [1956] 2 All ER 625 at 628, CA, per Denning LJ (plaintiff, by walking through the tunnel of a light railway, accepted the risk of normal running of a railway, but not of negligence by the train driver); distinguished in *Morris v Murray* [1991] 2 QB 6, [1990] 3 All ER 801, CA (after drinking heavily with pilot, plaintiff agreed to take a flight with him; plane crashed on take off; claim barred by defence of volenti non fit injuria). See also *Hall v Hebert* (1993) 101 DLR (4th) 129, Can SC; *Sanderson v Betts (Insurance Corpn of British Columbia, third party)* (1988) 53 DLR (4th) 675, BC CA.

8 *Nettleship v Weston* [1971] 2 QB 691, [1971] 3 All ER 581, CA.

9 If the employment is necessarily dangerous the employee must be prepared to take such risks as the employer cannot reasonably eliminate: see *Clarke v Holmes* (1862) 7 H & N 937 at 943, Ex Ch, per Cockburn CJ; *Watt v Hertfordshire County Council* [1954] 2 All ER 368 at 370-371, [1954] 1 WLR 835 at 837-838, CA, per Singleton, Denning and Morris LJJ (fireman); cf *Bowater v Rowley Regis Corpn* [1944] KB 476 at 479, [1944] 1 All ER 465 at 465, CA, per Scott LJ, at 481 and 467 per Goddard LJ (carter's horse bolting). See also *Withers v Perry*

Chain Co Ltd [1961] 3 All ER 676, [1961] 1 WLR 1314, CA, where the plaintiff was susceptible, to her and her employer's knowledge, to dermatitis, and her employer found work for her which entailed a slight risk of the disease, and the employer was held not liable for her contracting it. In *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999, HL, where the claim rested on vicarious liability for joint and flagrant disobedience of a safety rule by the plaintiff and his wrong-doing fellow employee, and where the fellow employee was not the superior of the plaintiff or one whose orders the plaintiff was bound to obey, the employer had available against the plaintiff employee the defence of volenti non fit injuria.

10 *Bowater v Rowley Regis Corpn* [1944] KB 476, [1944] 1 All ER 465, CA; applied in *London Graving Dock Co Ltd v Horton* [1951] AC 737 at 744, [1951] 2 All ER 1 at 4, HL, per Lord Porter, at 783 and 27-28 per Lord Reid.

11 *Burnett v British Waterways Board* [1973] 2 All ER 631, [1973] 1 WLR 700, CA (lighterman was injured in the defendant's dock having read a notice that he entered it at his own risk and it was held that he was not barred by the defence of volenti non fit injuria because he had not agreed to be bound by the notice and had no choice in the matter). For the view that the employee is to be regarded as free to choose, although he is not so in fact see *London Graving Dock Co Ltd v Horton* [1951] AC 737 at 755, [1951] 2 All ER 1 at 11, HL, per Lord Normand; and *Smith v Austin Lifts Ltd* [1959] 1 All ER 81 at 94, [1959] 1 WLR 100 at 118, HL, per Lord Denning.

12 *Haynes v Harwood* [1935] 1 KB 146, CA (approving *Brandon v Osborne, Garrett & Co Ltd* [1924] 1 KB 548; and criticising dicta of Scrutton LJ in *Cutler v United Dairies (London) Ltd* [1933] 2 KB 297, CA); *The Gusty and the Daniel M* [1940] P 159 (ship in peril); *Morgan v Ayler* [1942] 1 All ER 489 (child on highway); *Ward v T E Hopkins & Son Ltd* [1959] 3 All ER 225, sub nom *Baker v T E Hopkins & Son Ltd* [1959] 1 WLR 966, CA (doctor risking fumes).

13 *D'Urso v Sanson* [1939] 4 All ER 26 (fire; employee acting in the course of duty); *Steel v Glasgow Iron and Steel Co Ltd* 1944 SC 237, Ct of Sess (runaway railway wagon).

14 See *Reeves v Metropolitan Police Comr* [1999] QB 169, [1998] 2 All ER 381, CA (revsd in part on other grounds [2000] 1 AC 360, [1999] 3 All ER 897, HL).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(1) ASSUMPTION OF RISK/71. Passengers in vehicles.

71. Passengers in vehicles.

The application of the defence of volenti non fit injuria[1] is greatly modified where vehicles are being used in circumstances in which third party insurance is compulsory. If any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) is of no effect so far as it purports or might be held to negative or restrict any such liability of the user to passengers, or to impose any conditions with respect to the enforcement of any such liability[2]; and the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user must not be treated as negativing any such liability of the user[3].

1 See PARA 69.

2 Road Traffic Act 1988 s 149(1), (2); and see **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 949.

3 Road Traffic Act 1988 s 149(3). See *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA (decision based on the Road Traffic Act 1972 s 148(3) (repealed): see now the Road Traffic Act 1988 s 149(3)); and **ROAD TRAFFIC** vol 40(2) (2007 Reissue) PARA 949.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(1) ASSUMPTION OF RISK/72. Games, sports and entertainments.

72. Games, sports and entertainments.

A person engaged in playing a lawful game takes on himself the risks incidental to being a player[1], and has no remedy by action for injuries received in the course of the game unless they are caused by some unfair act or foul play amounting to negligence[2]. The principle is applicable not only to regulated sports but also to informal games or 'horseplay'[3]. If the game is unlawful the fact that the claimant has consented to the risks may not in itself be a bar to his recovering damages in respect of any injury arising out of it[4]. However, if the injury arises from an act done in the direct execution of the illegal common purpose, it seems that the claimant may be debarred from recovering on the principle that an action which arises from an immoral cause cannot be sustained[5].

A spectator of a lawful sport or entertainment can recover in respect of injury resulting from the negligent act of one of the players or the omission by the promoters to guard against accidents which are foreseeable and not inherent in the sport or entertainment[6], unless it can be shown that he agreed to take the risk of being injured by such negligence[7].

A referee owes the players in an organised game a duty to take reasonable care for their safety[8].

1 *Giles v LCC* (1903) 68 JP 10; *Cope v Cassells* (4 April 1991, unreported), QBD. He does not take on himself additional risks due to the provision of unsuitable premises or inadequate safety precautions: *Gillmore v LCC* [1938] 4 All ER 331, CA. See also *Morrell v Owen* (1993) Times, 14 December; *Wheeler v Trustees of St Mary's Hall, Chislehurst* (1989) Times, 10 October; *Gannon v Rotheram Metropolitan Borough Council* (6 February 1991, unreported), Crown Court at Nottingham (negligent failure to warn of danger of shallow end diving).

2 *Reid v Mitchell* (1885) 22 Sc LR 748, Ct of Sess. Participants owe a duty to each other to take all reasonable care having regard to the particular circumstances: *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866, CA. A professional footballer injured by another during a game will be able to establish negligence against that player if he can show that the player's conduct was such that a reasonable professional football player would have known it carried with it a significant risk of serious injury: *Watson v Gray* (1998) Times, 26 November. See also *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054, [2002] PIQR P6.

3 See *Blake v Galloway* [2004] EWCA Civ 814, [2004] 3 All ER 315, [2004] 1 WLR 2844 (no liability for injury inadvertently caused during stick-throwing game being played by teenagers).

4 See *Boulter v Clark* (1747) Bull NP 16 (there can be no consent to assault in the course of unlawful fighting); *Matthew v Ollerton* (1693) Comb 218. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 115-117.

5 See *National Coal Board v England* [1954] AC 403 at 428-429, [1954] 1 All ER 546 at 558, HL, per Lord Asquith.

6 *Wilks (formerly an infant) v Cheltenham Home Guard Motor Cycle and Light Car Club* [1971] 2 All ER 369, [1971] 1 WLR 668, CA. See also PARA 29 et seq.

7 *Welsh v Canterbury and Paragon Ltd* (1894) 10 TLR 478 (acrobatic performance); *Cleghorn v Oldham* (1927) 43 TLR 465 (golf); *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205, CA (motor racing); *Murray v Harringay Arena Ltd* [1951] 2 KB 529, [1951] 2 All ER 320n, CA (ice hockey); *Wooldridge v Sumner* [1963] 2 QB 43, [1962] 2 All ER 978, CA (horse show).

8 See *Vowles v Evans* [2003] EWCA Civ 318, [2003] 1 WLR 1607, [2003] PIQR P544 (amateur rugby match).

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(2) LIMITATION OF ACTIONS/73. Limitation of actions.

(2) LIMITATION OF ACTIONS

73. Limitation of actions.

The general rule is that actions for damages for negligence may not be brought after the expiration of six years[1] from the date on which the cause of action accrued[2]. In negligence actions, since damage is an essential part of the cause of action, the period of limitation runs from the date of the damage and not of the act which causes the damage[3].

In the case of latent damage other than personal injuries, the period is either six years from the date on which the cause of action accrued or, if later, three years from the date when it was discovered or could reasonably have been discovered[4].

Where the damages claimed by the claimant consist of or include damages in respect of personal injuries to the claimant or any other person, no action may be brought after the expiration of three years from the date on which the cause of action accrued or, if later, the date of knowledge[5]. Personal injuries and damage to property, although they have been occasioned by the same wrongful act, are infringements of different rights and give rise to distinct causes of action, so that the expiry of time for an action for personal injuries is no bar to an action for damage to property[6]. There is a three-year limitation period for bringing an action under the Fatal Accidents Act 1976[7]. The court, however, has power to override the time limit for personal injury actions or actions under the Fatal Accidents Act 1976[8].

If on the date when any right of action accrued the person to whom it accrued was under a disability[9], the action may be brought at any time before the expiration of six years (or in certain cases three years[10] or less[11]) from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired[12].

The general periods of limitation laid down by the Limitation Act 1980 do not apply to any action for which a special period[13] of limitation is imposed[14].

1 As to the six-year period see **LIMITATION PERIODS** vol 68 (2008) PARA 952.

2 Limitation Act 1980 s 2. However, in personal injury actions and cases of latent damage, time begins to run from the date of the plaintiff's knowledge if this date is later than the date on which the cause of action accrued: see text and notes 4, 5. As to the accrual of a cause of action see generally **LIMITATION PERIODS** vol 68 (2008) PARA 920.

3 *Backhouse v Bonomi* (1861) 9 HL Cas 503; *Whitehouse v Fellowes* (1861) 10 CBNS 765; *Hodsden v Harris* (1669) 2 Wms Saund (1871 Edn) 150 at 166 note (q); *Lloyd v Wigney* (1830) 6 Bing 489; *Wordsworth v Harley* (1830) 1 B & Ad 391; *Roberts v Read* (1812) 16 East 215; *Gillon v Boddington* (1824) Ry & M 161; *Howell v Young* (1826) 5 B & C 259. As to the date from which time runs in the case of an action for negligence amounting to a breach of a contractual duty see **LIMITATION PERIODS** vol 68 (2008) PARA 984.

It has been held that a cause of action for defective building work accrues from the date the damage occurs, not the date of discovery: see *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1, [1983] 1 All ER 65, HL, overruling *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858, [1976] 2 All ER 65, CA. It seems, however, that *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* above is not an authority of wide application; and that where the loss is purely economic a duty will not be owed in the absence of an inter partes professional relationship or a special relationship based on assumption of responsibility: see *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854, [1992] 1 WLR 498. As to defective products or buildings see further PARA 15.

4 See the Limitation Act 1980 s 14A (added by the Latent Damage Act 1986 s 1). Claims are in any event barred after the expiration of 15 years from the occurrence of the original act of negligence: see the Limitation Act 1980 s 14B (added by the Latent Damage Act 1986 s 1). See further **LIMITATION PERIODS** vol 68 (2008) PARA 982.

5 Limitation Act 1980 s 11. As to the date of a person's knowledge for the purpose of the application of the limitation period in personal injury actions see s 14; and **LIMITATION PERIODS** vol 68 (2008) PARA 999. A claimant cannot evade the three-year rule by relying on a cause of action in trespass instead of negligence: *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA. As to time limits generally in personal injury actions see **LIMITATION PERIODS** vol 68 (2008) PARAS 998-1002.

6 *Brunsden v Humphrey* (1884) 14 QBD 141, CA.

7 See the Limitation Act 1980 s 12(2); PARA 28; and **LIMITATION PERIODS** vol 68 (2008) PARA 1000.

8 See the Limitation Act 1980 s 33; and **LIMITATION PERIODS** vol 68 (2008) PARA 1001.

9 Ie was a minor or a person of unsound mind: see the Limitation Act 1980 s 38(2). As to the meaning of 'disability' see further **LIMITATION PERIODS** vol 68 (2008) PARA 1170.

10 Eg in cases of personal injuries actions: see the text and note 5.

11 Ie in cases of contribution between joint tortfeasors: see the Limitation Act 1980 s 10(1). See further **LIMITATION PERIODS** vol 68 (2008) PARAS 1006, 1177.

12 See the Limitation Act 1980 s 28. As to the effect of disability see further **LIMITATION PERIODS** vol 68 (2008) PARA 1171.

13 As to proceedings for which special time limits are provided see **LIMITATION PERIODS** vol 68 (2008) PARA 908 et seq.

14 Limitation Act 1980 s 39. See further **LIMITATION PERIODS** vol 68 (2008) PARA 918.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/4. DEFENCES/(3) EXCLUSION OF LIABILITY/74. Agreements to exclude or restrict liability.

(3) EXCLUSION OF LIABILITY

74. Agreements to exclude or restrict liability.

The Unfair Contract Terms Act 1977[1] applies to liability for negligence, which for this purpose means the breach[2] (1) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract[3]; (2) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty)[4]; or (3) of the common duty of care[5] imposed by the Occupiers' Liability Act 1957[6]. The negligence must arise from things done or to be done by a person in the course of a business[7] (whether his own business or another's) or from the occupation of premises used for business purposes[8] of the occupier[9].

A person to whom the Unfair Contract Terms Act 1977 applies cannot, by reference to any contract term or to a notice[10] given to persons generally or to particular persons, exclude or restrict his liability[11] for death or personal injury[12] resulting from negligence[13]. In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirements of reasonableness[14].

In the case of goods[15] of a type ordinarily supplied for private use or consumption, where loss or damage arises from the goods proving defective while in consumer use[16] and results from the negligence of a person concerned in the manufacture or distribution of the goods, liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee[17] of the goods[18].

In the case of loss or damage other than death or personal injury, a person to whom the Unfair Contract Terms Act 1977 applies cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness[19]. It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does[20].

The Unfair Contract Terms Act 1977 does not abolish the defence of volenti non fit injuria[21] but provides that where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk[22].

Several other statutes prevent persons from contracting out of liability for negligence[23]. Even if the validity of a contract term is unaffected by legislation, the court still has to construe the contract in order to decide how far it excludes or restricts liability in negligence[24]. An express clause in a trust instrument which exempts a trustee from liability for loss or damage unless caused by his own dishonesty, no matter how negligent or wilful he might be, is not void for repugnancy, or on the grounds of public policy[25].

1 The Unfair Contract Terms Act 1977 came into force on 1 February 1978: s 31(1). It does not apply to contracts made before that date, but subject to this restriction it applies to liability for loss or damage suffered on or after that date: s 31(2). As to the Unfair Contract Terms Act 1977 generally see **CONTRACT**.

2 It is immaterial whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously: Unfair Contract Terms Act 1977 s 1(4).

3 Unfair Contract Terms Act 1977 ss 1(1)(a), 14.

4 Unfair Contract Terms Act 1977 ss 1(1)(b), 14. A disclaimer or notice excluding liability is not to be taken into account in assessing the existence of a duty of care: see *Smith v Eric S Bush* [1990] 1 AC 831 at 856-857, [1989] 2 All ER 514 at 529-530, HL, per Lord Griffiths.

5 As to the common duty of care see PARA 32.

6 Unfair Contract Terms Act 1977 ss 1(1)(c), 14. As to exclusion of liability under the Occupiers' Liability Act 1957 see PARA 38. There is no reference to the duty owed by an occupier to a trespasser under the Occupiers' Liability Act 1984 s 1 (as to which see PARA 40).

7 'Business' includes a profession and the activities of any government department or local or public authority: Unfair Contract Terms Act 1977 s 14.

8 In the case of both contract and tort, the Unfair Contract Terms Act 1977 ss 2-7 apply (except where the contrary is stated in s 6(4)) only to business liability, ie liability for breach of obligations or duties arising (1) from things done or to be done by a person in the course of a business, whether his own business or another's; or (2) from the occupation of premises used for business purposes of the occupier, and references to liability are to be read accordingly; but liability of an occupier of premises for breach of an obligation or duty towards a person obtaining access to the premises for recreational or educational purposes, being liability for loss or damage suffered by reason of the dangerous state of the premises, is not a business liability of the occupier unless granting that person such access for the purposes concerned falls within the business purposes of the occupier: s 1(3) (amended by the Occupier's Liability Act 1984 s 2).

9 See the Unfair Contract Terms Act 1977 s 1(3).

10 'Notice' includes an announcement, whether or not in writing, and any other communication or pretended communication: Unfair Contract Terms Act 1977 s 14.

11 To the extent that the Unfair Contract Terms Act 1977 prevents the exclusion or restriction of any liability it also prevents (1) making the liability or its enforcement subject to restrictive or onerous conditions (s 13(1)(a)); (2) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy (s 13(1)(b)); and (3) excluding or restricting rules of evidence or procedure (s 13(1)(c)). To that extent it also prevents excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty: s 13(1). An agreement in writing to submit present or future differences to arbitration is not to be treated under these provisions as excluding or restricting any liability: s 13(2).

12 'Personal injury' includes any disease and any impairment of physical or mental condition: Unfair Contract Terms Act 1977 s 14.

13 See the Unfair Contract Terms Act 1977 s 2(1); and **CONTRACT** vol 9(1) (Reissue) PARA 822. The Unfair Contract Terms Act 1977 is concerned with protecting the victim of negligence, and does not prevent an agreement for sharing or transferring the burden of compensating the victim: see *Thompson v T Lohan (Plant Hire) Ltd (J W Hurdiss Ltd, third party)* [1987] 2 All ER 631, [1987] 1 WLR 649, CA; cf *Phillips Products Ltd v Hyland* (1984) [1987] 2 All ER 620, [1987] 1 WLR 659n, CA.

14 Unfair Contract Terms Act 1977 s 2(2). See *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

15 'Goods' has the same meaning as in the Sale of Goods Act 1979 (see s 61(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 30): Unfair Contract Terms Act 1977 s 14 (amended by the Sale of Goods Act 1979 s 63(1), Sch 2).

16 Goods are to be regarded as in consumer use when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business: Unfair Contract Terms Act 1977 s 5(2)(a).

17 Anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise: Unfair Contract Terms Act 1977 s 5(2)(b).

18 Unfair Contract Terms Act 1977 s 5(1); and see **CONTRACT** vol 9(1) (Reissue) PARA 825. Section 5 does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed: s 5(3). As to the liability in negligence of manufacturers and distributors see PARAS 47-50.

19 Contract terms are required to be fair and reasonable to be included, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made: see the Unfair Contract Terms Act 1977 s 11(1). For a notice which is not contractual, the requirement of reasonableness is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen: s 11(3). See *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *McCullagh v Lane Fox & Partners Ltd* [1996] 1 EGLR 35, CA.

20 Unfair Contract Terms Act 1977 s 11(5); and see **CONTRACT** vol 9(1) (Reissue) PARA 831.

21 As to the defence of volenti non fit injuria see PARAS 69-72.

22 See the Unfair Contract Terms Act 1977 s 2(3); and **CONTRACT** vol 9(1) (Reissue) PARA 822. See also *Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293, CA.

23 The Law Reform (Personal Injuries) Act 1948 s 1(3) renders void any agreement excluding or limiting an employer's liability in respect of personal injuries caused to an employee or apprentice by the negligence of persons in common employment with him. Statutory restrictions also apply to agreements to exclude or limit liability for negligent breaches of contractual duty in the case of building societies (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1970); company officers (see **COMPANIES** vol 14 (2009) PARA 594 et seq); solicitors (see the Solicitors Act 1974 s 60(5); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 946); carriers by air (see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 121 et seq); carriers by road or rail (see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 650 et seq); and carriers by sea (see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 205 et seq).

24 See *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244, CA; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021, [1953] 1 WLR 1285, CA; *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 at 125, CA, per Denning LJ. See also *Hone v Benson* (1978) 248 Estates Gazette 1013. Contracts with third persons are no defence as against the claimant (*Haseldine v C A Daw & Son Ltd* [1941] 2 KB 343 at 379, [1941] 3 All ER 156 at 185, CA, per Goddard LJ), unless it can be said that the contracting party contracted as the claimant's agent, as where one person buys a ticket for another (*Grand Trunk Rly Co of Canada v Robinson* [1915] AC 740, PC; *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108). See also *Lee Cooper Ltd v C H Jeakins & Sons Ltd* [1967] 2 QB 1, [1965] 1 All ER 280, CA; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

25 See *Armitage v Nurse* [1998] Ch 241, [1997] 2 All ER 705, CA. But where there is doubt whether an act or omission falls within the scope of a trustee exclusion clause, the clause must be construed so as not to protect the trustee: *Wight v Olswang* (1998) Times, 17 September.

5. APPORTIONMENT OF LIABILITY

(1) CONTRIBUTORY NEGLIGENCE

75. Effect of contributory negligence.

In an action for injuries arising from negligence it was a complete defence at common law if the defendant proved that the plaintiff, by some negligence on his own part, directly contributed to the injury[1]. However, the Law Reform (Contributory Negligence) Act 1945[2] provides that where any person suffers damage[3] as the result partly of his own fault[4] and partly of the fault[5] of any other person or persons[6], a claim in respect of that damage is not to be defeated by reason of the fault of the person suffering the damage, but the damages recoverable[7] in respect thereof are to be reduced to such extent as the court[8] thinks just and equitable having regard to the claimant's share in the responsibility for the damage[9]. The provision applies to contractual liability where this is based on a failure to take reasonable care and that failure also constituted negligence actionable as such in tort[10], but it does not operate to defeat any defence arising under a contract[11] and does not raise the limit of damages recoverable where any contract or enactment provides for the limitation of liability[12]. Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons so that if an action were brought for the benefit of his estate[13], the damages recoverable would be reduced under the Law Reform (Contributory Negligence) Act 1945, any damages recoverable in an action under the Fatal Accidents Act 1976[14] are reduced to a proportionate extent[15]. Where, in any case to which the Law Reform (Contributory Negligence) Act 1945 applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act 1980 or any other enactment limiting time[16], he is not entitled to recover any damages from that other person or representative[17]. Whether a child has been guilty of contributory negligence depends on the nature of the danger involved and on that child's ability to appreciate that danger[18].

1 See *Ketch Frances (Owners) v SS Highland Loch (Owners), The Highland Loch* [1912] AC 312, HL; *The Blow Boat* [1912] P 217.

2 The Law Reform (Contributory Negligence) Act 1945 applies to contributory negligence on land the principle which the Maritime Conventions Act 1911 (repealed) applied to contributory negligence at sea. The 1911 Act was unaffected by the 1945 Act (see the Law Reform (Contributory Negligence) Act 1945 s 3(1)), but has now been consolidated into the Merchant Shipping Act 1995 s 189(1), (3), (4) (see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARAS 807, 1082).

The Law Reform (Contributory Negligence) Act 1945 binds the Crown in cases in which the Crown is liable in tort: Crown Proceedings Act 1947 s 4(3). The defence of contributory negligence must be specifically pleaded: *Fookes v Slaytor* [1979] 1 All ER 137, [1978] 1 WLR 1293, CA. The provisions of the Law Reform (Contributory Negligence) Act 1945 govern the manner in which a court may exonerate an air carrier wholly or partly from his negligence liability under the Convention for the Unification of Certain Rules relating to International Carriage by Air (the 'Warsaw Convention') (Warsaw, 12 October 1929; TS 11 (1933); Cmd 4284): see the Carriage by Air Act 1961 s 6, Sch 1 art 21 (Sch 1 substituted as from a day to be appointed by the Carriage by Air and Road Act 1979 s 1(1), Sch 1); and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 171.

3 'Damage' includes loss of life and personal injury: Law Reform (Contributory Negligence) Act 1945 s 4. Where one of two wrongdoers has alone been sued and has therefore been held liable to pay to the plaintiff the whole of the damages recoverable by him, that wrongdoer cannot be held to have suffered damage for the purpose of s 1(1) so as to entitle him to recover from the other wrongdoer a share of the damages: *Drinkwater v Kimber* [1952] 2 QB 281, [1952] 1 All ER 701, CA.

4 There are conflicting decisions of the Court of Appeal on whether there can be findings of 100% contributory negligence: see *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155 at 159, CA, per Robert Goff LJ (in favour); and *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA (against). The prevailing view is that it is illogical to make a 100% deduction because it could not be said in such a case, that the claimant shared in the responsibility for the damage: see *Anderson v Newham College of Further Education* [2002] EWCA Civ 505, [2003] ICR 212, [2002] All ER (D) 381 (Mar), especially at [18] per Sedley LJ.

5 'Fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Law Reform (Contributory Negligence) Act 1945, give rise to a defence of contributory negligence: s 4.

Certain statutes provide that damage for which a person is liable thereunder is for the purpose of the Law Reform (Contributory Negligence) Act 1945 to be treated as resulting from his fault: see eg the Animals Act 1971 s 10; and the Control of Pollution Act 1974 s 88(4).

The Law Reform (Contributory Negligence) Act 1945 applies to liability for breach of a contractual duty of care where there would also be liability in tort independently of the existence of the contract: *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA (on appeal [1989] AC 852, [1989] 1 All ER 402, HL); cited and applied in *UCB Bank plc v Hepherd Winstanley & Pugh (a firm)* [1999] Lloyd's Rep PN 963, CA. See also *Sayers v Harlow UDC* [1958] 2 All ER 342, [1958] 1 WLR 623, CA, where the plaintiff sued in both contract and negligence, and contributory negligence was a defence to either cause of action; applied in *De Meza and Stuart v Apple, Van Straton, Shena and Stone* [1974] 1 Lloyd's Rep 508 (affd on other grounds [1975] 1 Lloyd's Rep 498, CA), where damages were reduced for breach of contract on account of the plaintiff's failure to notice the defendant's error. The defence of contributory negligence can apply to a claim under the Misrepresentation Act 1967 s 2(1): *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865. Contributory negligence is not a defence to a claim founded on breach of strict contractual obligation where there is no corresponding liability in negligence: *Barclays Bank plc v Fairclough Building Ltd* [1995] QB 214, [1995] 1 All ER 289, CA. Contributory negligence does not, however, apply to an action for deceit: *Alliance and Leicester Building Society v Edgestop* [1994] 2 All ER 38, [1993] 1 WLR 1462.

6 As to actions between joint tortfeasors see PARA 83.

7 The court must find and record the total damages which would have been recoverable if the claimant had not been at fault: Law Reform (Contributory Negligence) Act 1945 s 1(2). Where any case to which s 1(1) applies is tried with a jury, the jury must determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced: s 1(6). A county court has no power to assess total damages beyond the limit of the court's jurisdiction even though, by reason of the claimant's fault, the damages actually recoverable are within the limit: *Kelly v Stockport Corpn* [1949] 1 All ER 893, CA; doubted and not followed in *Artt v W G and T Greer* [1954] NI 112.

8 'Court' means, in relation to any claim, the court or arbitrator by or before whom the claim falls to be determined: Law Reform (Contributory Negligence) Act 1945 s 4.

9 Law Reform (Contributory Negligence) Act 1945 s 1(1). See *Reeves v Metropolitan Police Comr* [2000] 1 AC 360, [1999] 3 All ER 897, HL (although police have a duty to protect a prisoner from suicide, the prisoner is equally responsible for his own life; if prisoner commits suicide, any damages should be reduced by 50%). See also *Sahib Foods Ltd (in liquidation) v Paskin Kyriakides Sands (a firm)* [2003] EWCA Civ 1832, 93 Con LR 1, (2004) Times, 23 January (damage to a factory caused by a fire which was the claimant's fault, but defendant architect also liable for not installing fire resistant panels).

10 *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, [1988] 2 All ER 43, CA (on appeal [1989] AC 852, [1989] 1 All ER 402, HL). See also note 4. Where the contractual liability is strict, the Law Reform (Contributory Negligence) Act 1945 will not apply; and where liability is fault based, but falls outside the scope of the tort of negligence, the Act is unlikely to apply: see further *Contributory Negligence as a Defence in Contract* (Law Com no 219) (1993).

11 As to other statutory restrictions on contracts limiting negligence liability see PARA 74.

12 See the Law Reform (Contributory Negligence) Act 1945 s 1(1) proviso.

13 Ie under the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1): see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 814 et seq.

14 See PARA 25 et seq. As to the persons for whose benefit an action can be brought under the Fatal Accidents Act 1976 see PARA 27.

15 Fatal Accidents Act 1976 s 5 (amended by the Administration of Justice Act 1982 ss 3(2), 75(1), Sch 9 Pt I).

16 See **LIMITATION PERIODS** vol 68 (2008) PARA 908 et seq.

17 Law Reform (Contributory Negligence) Act 1945 s 1(5) (amended by the Civil Liability (Contribution) Act 1978 s 9(2), Sch 2). As to the entitlement of a person liable in respect of any damage suffered by another person to recover contribution from any other person liable in respect of the same damage see PARA 83.

18 See *Galbraith's Curator ad Litem v Stewart (No 2)* 1998 SLT 1305n. See also PARA 78 note 5.

76. The negligence must be contributory.

In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm[1] which he has suffered in consequence of the defendant's negligence[2]. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm[3]. The question must be dealt with broadly and upon commonsense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment[4]. The test is whether in the ordinary plain common sense the claimant contributed to the damage[5].

1 A person may be guilty of contributory negligence even though his conduct in no way contributed to the accident itself if his act or omission contributed to the nature or extent of his injuries: *O'Connell v Jackson* [1972] 1 QB 270, [1971] 3 All ER 129, CA (failure of motor cyclist to wear crash helmet); *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520, CA (failure to wear a safety belt). See also *Owens v Brimmell* [1977] QB 859, [1976] 3 All ER 765 (failure to wear a seat belt not proved to contribute to injuries; but taking a lift with a drunk driver did contribute). However, the harm sustained by the claimant must belong to that general class of perils to which the claimant was exposed by his negligence: see *Jones v Livox Quarries Ltd* [1952] 2 QB 608, CA (where the plaintiff negligently rode on the back of a traxcavator vehicle and was injured when another vehicle ran into the rear of the traxcavator, this was held to be contributory negligence, but would not have been if while so riding he had been hit by a shot fired by a negligent sportsman, for the plaintiff's carelessness did not expose him to greater risk of such an accident).

2 'The abolition of the rule that any contributory negligence, however small, on the part of a plaintiff defeated his claim, has no effect on causation': *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 677, [1953] 2 All ER 478 at 483, HL, per Lord Porter; cf *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 677, [1964] 2 All ER 999 at 1006-1007, HL, per Lord Radcliffe; *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 165, [1939] 3 All ER 722 at 730, HL, per Lord Atkin: 'I find it impossible to divorce any theory of contributory negligence from the concept of causation'.

3 *Boy Andrew (Owners) v St Rognvald (Owners)* [1948] AC 140 at 149, sub nom *Admiralty Comrs v North of Scotland and Orkney and Shetland Steam Navigation Co Ltd* [1947] 2 All ER 350 at 353-354, HL, per Viscount Simon. Since this case, the doctrine of 'last opportunity', first formulated in *Davies v Mann* (1842) 10 M & W 546 and approved in *Radley v London and North Western Rly Co* (1876) 1 App Cas 754, HL, has no place as a test of causation and is obsolete: see *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 321-322, [1949] 1 All ER 620 at 629-630, CA, per Denning LJ; *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615, CA, per Denning LJ.

4 See *Admiralty Comrs v SS Volute (Owners)* [1922] 1 AC 129 at 144, HL, per Viscount Birkenhead; *Swadling v Cooper* [1931] AC 1, HL; *Henley v Cameron* [1949] LJR 989, CA (where the defendant left his car unlit on the highway at night, and the plaintiff's husband, riding a motor cycle, collided with it and was killed, and was held contributorily negligent); *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 616, CA, per Denning LJ; *Marvin Sigurdson v British Colombia Electric Rly Co Ltd* [1953] AC 291 at 299, PC; *Harvey v Road Haulage Executive* [1952] 1 KB 120, CA; *Rouse v Squires* [1973] QB 889, [1973] 2 All ER 903, CA. Since the Law Reform (Contributory Negligence) Act 1945 made apportionment possible the courts have not striven so hard to find that the claimant's negligence played no part in the ensuing accident: see *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 667, [1953] 2 All ER 478 at 483, HL, per Lord Porter. In *Radburn v Kemp* [1971] 3 All ER 249, [1971] 1 WLR 1502, CA, the plaintiff cyclist negligently failed to stop before the car driven by defendant collided with him; it was held that there was no contributory negligence because the defendant failed to prove that the plaintiff would have avoided the collision had he stopped when he should first have seen the defendant's car.

5 See *Admiralty Comrs v SS Volute (Owners)* [1922] 1 AC 129 at 145, HL, per Viscount Birkenhead. See also *Badger v Ministry of Defence* [2005] EWHC 2941 (QB), [2006] 3 All ER 173, 91 BMLR 1; *St George v Home Office* [2008] EWCA Civ 1068, [2008] 4 All ER 1039, [2009] 1 WLR 1670.

77. Contributory negligence not dependent on the duty of care.

The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant[1] and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury[2].

1 In the expression 'contributory negligence', the word 'negligence' thus bears a different meaning from negligence as an actionable wrong, where the existence of a duty owed to another person is essential. This is not to say that in all cases a claimant who is guilty of contributory negligence owes to the defendant no duty to act carefully. For example, when a pedestrian steps carelessly into the roadway he is both guilty of contributory negligence and in breach of a duty of care to approaching traffic: see *Nance v British Columbia Electric Rly Co Ltd* [1951] AC 601 at 611, [1951] 2 All ER 448 at 451, PC. See also *Williams v Richards* (1852) 3 Car & Kir 81; *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, [1949] 1 All ER 620, CA.

2 See *Nance v British Columbia Electric Rly Co Ltd* [1951] AC 601 at 611, [1951] 2 All ER 448 at 451, PC.

Halsbury's Laws of England/NEGLIGENCE (VOLUME 78 (2010) 5TH EDITION)/5. APPORTIONMENT OF LIABILITY/(1) CONTRIBUTORY NEGLIGENCE/78. Standard of care in contributory negligence.

78. Standard of care in contributory negligence.

The standard of care in contributory negligence is what is reasonable in the circumstances, and this usually corresponds to the standard of care in negligence[1]. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself[2]. A claimant must take into account the possibility of others being careless[3]. As with negligence, the standard of care is objective in that the claimant is assumed to be of normal intelligence and skill in the circumstances[4]. To this rule there is one clear exception, in that a child is required only to show that degree of care reasonable in a child of his age[5]. It may be that physical disabilities such as defective hearing or eyesight of an old person may also be taken into account[6]. If the negligence of the defendant puts the claimant in a position of imminent personal danger then conduct by the claimant which in fact operates to cause harm to him, but which is nevertheless reasonable in the agony of the moment, does not amount to contributory negligence[7].

1 *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL.

2 See *Samways v Westgate Engineers* (1962) 106 Sol Jo 937, CA, where a dustman cut by glass protruding from a carton put out for refuse by the defendants was contributorily negligent in not wearing gloves provided by his employers. See also *Sayers v Harlow UDC* [1958] 2 All ER 342, [1958] 1 WLR 623, CA. The burden of proving contributory negligence is on the defendant: *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41, HL; *SS Heranger (Owners) v SS Diamond (Owners)* [1939] AC 94, HL.

3 See *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615, CA, per Denning LJ; *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 567, [1948] 2 All ER 238 at 247, HL, per Lord du Parcq.

4 *Baxter v Woolcombers* (1963) 107 Sol Jo 553, CA, where the plaintiff workman's contributory negligence lay in not complying with instructions; the court refused to take account of his known low intelligence. See also *Chittock v Woodbridge School* [2002] EWCA Civ 915, (2002) Times, 15 July, [2002] All ER (D) 207 (Jun) (pupil injured in skiing accident; teacher not responsible).

5 *Gough v Thorne* [1966] 3 All ER 398, [1966] 1 WLR 1387, CA; *Jones v Lawrence* [1969] 3 All ER 267 (no contributory negligence by a child aged seven showing care reasonable for his age); *Yachuk v Oliver Blais Co Ltd* [1949] AC 386, [1949] 2 All ER 150, PC (child aged nine not contributorily negligent in meddling with gasoline can which he had bought ostensibly for his mother's car); *Mullin v Richards* [1998] 1 All ER 920, [1998] 1 WLR 1305, CA (no liability for injury caused when 15-year-old school pupils fenced with plastic rulers: finding by trial judge of 50% contributory negligence reversed). The decisions before 1945 are not reliable pointers now because in many cases judges denied contributory negligence and awarded damages to the child, where today they would apportion responsibility. See eg *Morales v Eccleston* [1991] RTR 151, CA, where a boy aged 11 was held 75% contributorily negligent for running out into a busy road without looking.

6 See *Daly v Liverpool Corpn* [1939] 2 All ER 142, where it was held to be relevant that a pedestrian injured when crossing a road was 69 years old. However, an authoritative post-1945 English decision is lacking. The standard of care which a defendant has to show towards a claimant of known disability, eg blindness, is higher in appropriate circumstances: see *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, HL; and PARA 22.

7 *Jones v Boyce* (1816) 1 Stark 493 (owing to a defective rein the horses in a coach became ungovernable while going down a hill and ran into some piles, and the plaintiff chose to jump off the coach rather than run the risk of being overturned; it was held that he could recover damages). See also *Brandon v Osborne, Garrett & Co Ltd* [1924] 1 KB 548; *Chaplin v Hawes* (1828) 3 C & P 554 (followed in *Turley v Thomas* (1837) 8 C & P 103); *Stoomvaart Maatschappy Nederland v Peninsular and Oriental Steam Navigation Co* (1880) 5 App Cas 876, HL; *Wallace v Bergius* 1915 SC 205, Ct of Sess; *Sayers v Harlow UDC* [1958] 2 All ER 342, [1958] 1 WLR 623, CA.

79. Traffic cases.

In a very large number of claims arising out of road accidents, issues of contributory negligence arise. Although the question is essentially whether the claimant has taken reasonable care for his own safety in the circumstances, certain principles have emerged. It may be contributory negligence for an ordinary car passenger not to wear a seat belt[1], for a motor cyclist not to wear a crash helmet[2] and for a passenger to take a lift with a driver knowing him to be drunk and incapable of driving with due care[3]. There is no rule of law that a motorist who collides with an unlit vehicle on a highway at night must be contributorily negligent; all depends on the circumstances[4]. A driver must approach a pedestrian crossing prepared for ill-advised actions on the part of pedestrians[5], but there is no rule of law that a driver who collides with a pedestrian on a crossing is precluded from alleging contributory negligence by the pedestrian[6]. A driver who crosses a junction controlled by lights is negligent if he enters the crossing against the lights, but there is no rule of law that a motorist who enters with the lights in his favour cannot be guilty of contributory negligence[7]. A motorist on a major road who collides with a motorist emerging from a side road may be guilty of contributory negligence[8].

1 *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520, CA. This rule does not apply where the driver does not mention the belt to someone who is unaccustomed to it (*Geier (formerly Braun) v Kujawa, Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep 364), nor if the claimant has a phobia about wearing a belt (*Condon v Condon* [1978] RTR 483). A passenger in the front seat of an ambulance who failed to wear a belt, despite a notice instructing her to do so, was held not entitled to recover damages from the ambulance driver who failed to advise her to wear the belt: *Eastman v South West Thames Regional Health Authority* [1991] RTR 389, [1992] PIQR P42, CA. It is not contributory negligence not to fit or wear a belt in a vehicle not required by law to be fitted with a belt: *Hoadley v Dartford District Council* [1979] RTR 359, CA.

2 *O'Connell v Jackson* [1972] 1 QB 270, [1971] 3 All ER 129, CA; *Capps v Miller* [1989] 2 All ER 333, [1989] 1 WLR 839, CA (not fastening a helmet).

3 *Owens v Brimmell* [1977] QB 859, [1976] 3 All ER 765. Where a motor cycle passenger encouraged the drunk driver to commit dangerous driving offences, he was held to be disbarred from claiming at all on the ground that the parties were jointly engaged in an illegal activity: *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA; and see PARA 8.

4 *Tidy v Battman* [1934] 1 KB 319. To park a lorry, with lights on, on the wrong side of the road has been held to be contributory negligence: *Chisman v Electromation (Export) Ltd* (1969) 6 KIR 456, CA. See also *Thompson v Spedding* [1973] RTR 312, CA (where the defendant runs his car into the rear of the claimant's car he may still prove contributory negligence); and *Chop Seng Heng v Thevannasan s/o Sinnapan* [1975] 3 All ER 572, PC.

5 *London Passenger Transport Board v Upson* [1949] AC 155, [1949] 1 All ER 60, HL.

6 At first some thought that *Bailey v Geddes* [1938] 1 KB 156, [1937] 3 All ER 671, CA, did lay down such a rule, but many subsequent cases (eg *Knight v Sampson* [1938] 3 All ER 309; *Chisholm v London Passenger Transport Board* [1939] 1 KB 426, [1938] 4 All ER 850, CA; *Clifford v Drymond* (1975) 120 Sol Jo 149, CA) show that in the particular circumstances contributory negligence by such a pedestrian may be established. In *Barry v MacDonald* (1966) 110 Sol Jo 56, a pedestrian stepped off the kerb without looking and killed a cyclist and it was held that the pedestrian was liable and there was no contributory negligence by the cyclist. See also *Kerley v Downes* [1973] RTR 188, CA, where a pedestrian was knocked down while walking on a country road in the same direction as the traffic and was held not contributorily negligent even though he violated the Highway Code: *Powell v Phillips* [1972] 3 All ER 864, CA. As to the Highway Code see PARA 54; and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221. Where a vehicle's door handle projected over the pavement and caught the sleeve of a pedestrian it was held to be no defence for the driver that the pedestrian was near the edge of the pavement: *Watson v Thomas S Whitney & Co Ltd* [1966] 1 All ER 122, [1966] 1 WLR 57, CA.

7 *Joseph Eva Ltd v Reeves* [1938] 2 KB 393, [1938] 2 All ER 115, CA; *Radburn v Kemp* [1971] 3 All ER 249, [1971] 1 WLR 1502, CA. See also *Frank v Cox* (1967) 111 Sol Jo 670, CA (where the defendant passed traffic lights at green, then turned right and knocked down a pedestrian who had the lights in his favour, it was held that the pedestrian was not contributorily negligent, for he had no duty to safeguard himself against such monstrous driving); *Tremayne v Hill* [1987] RTR 131, CA (no contributory negligence where a pedestrian was hit by a car driven through a red traffic light).

8 *Butters v JH Fenner & Co Ltd* (1967) 117 NLJ 213. When a driver turns right from a side road into a major road he or she is under a duty to take extreme care when doing so: *Heaton v Herzog* [2008] EWCA Civ 1636, [2009] RTR 381, [2008] All ER (D) 125 (Nov) (liability apportioned 25% to the claimant who pulled out from side road into main road and 75% to the deceased who had been riding a motorcycle above the speed limit down the main road).

80. Knowledge by the claimant.

Knowledge by the claimant of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence[1]. The question is not whether the claimant realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger[2]. It is a question of fact in each case whether the knowledge of the claimant in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence[3]. The knowledge which a claimant has of the dangers of railways or places where the public has rights of access, and of the precautions taken in respect of such dangers, may tend either to establish or to refute contributory negligence. On the one hand, the claimant must act reasonably with regard to the dangers which he knows, or ought to know, exist[4], and to any regulations or other precautions imposed for the purpose of avoiding them[5]. On the other hand, he is entitled to rely on reasonable care and proper precautions being taken[6]; and, in places to which the public has access, he is entitled to assume the existence of such protection as the public has through custom become justified in expecting[7].

1 *A C Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL (plaintiff, finding that her way had negligently been blocked by the defendants, attempted to use another route which she knew and which a

reasonable person with that knowledge would have realised to be dangerous; it was held that the plaintiff and the defendants were equally at fault); approving *Clayards v Dethick and Davis* (1848) 12 QB 439.

2 See *A C Billings & Sons Ltd v Riden* [1958] AC 240 at 255, [1957] 3 All ER 1 at 8, HL, per Lord Reid (a reasonable person does not for this purpose mean a paragon of circumspection).

3 Eg *Smith v Baker & Sons* [1891] AC 325, HL; *Osborne v London and North Western Rly Co* (1888) 21 QBD 220 (knowledge of the dangerous condition of steps in a railway station and careful user of them when an alternative route was possible was held not to be contributory negligence); *Stuart v Evans* (1883) 49 LT 138; *Thompson v North Eastern Rly Co* (1862) 2 B & S 106 at 119; *Thomas v Quartermaine* (1887) 18 QBD 685, CA; *Williams v Birmingham Battery and Metal Co* [1899] 2 QB 338 at 345, CA; *Grant v Drysdale* (1883) 20 Sc LR 744; *Smerkinich v Newport Corpn* (1912) 76 JP 454; *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72, CA; *Bill v Short Bros and Harland Ltd* [1963] NI 1, HL.

4 *Manning v London and North Western Rly Co* (1907) 23 TLR 222, CA (evidence admitted of platforms of equal depth at other stations); *Goldberg v Glasgow and South Western Rly Co* 1907 SC 1035 (passengers injured by starting of train); *Ketch Frances (Owners) v SS Highland Loch (Owners), The Highland Loch* [1912] AC 312, HL (ketch damaged by lying near launching place after warning); *Jayes v IMI (Kynoch) Ltd* [1985] ICR 155, CA (workman acting carelessly despite the fact that he knew the dangerous machinery should have been fenced).

5 *Benson v Furness Rly Co* (1903) 88 LT 268, DC; *Drury v North Eastern Rly Co* [1901] 2 KB 322, DC (injury caused by shutting carriage door). Non-compliance with regulations which are habitually disregarded is not necessarily sufficient to establish contributory negligence: *Dublin, Wicklow and Wexford Rly Co v Slattery* (1878) 3 App Cas 1155, HL.

6 *Davey v London and South Western Rly Co* (1883) 12 QBD 70, CA; *R and W Paul Ltd v Great Eastern Rly Co* (1920) 36 TLR 344; *Curtin v Great Southern and Western Rly Co of Ireland* (1887) 22 LR Ir 219, Ir CA; *M'Donnell v Great Southern and Western Rly Co of Ireland* (1888) 24 LR Ir 369, CA; *Falkiner v Great Southern and Western Rly Co of Ireland* (1871) IR 5 CL 213.

7 *Smith v South Eastern Rly Co* [1896] 1 QB 178, CA; *Dublin, Wicklow and Wexford Rly Co v Slattery* (1878) 3 App Cas 1155, HL; *Rosenbaum v Metropolitan Water Board* (1910) 26 TLR 510 (where a new trial was ordered on the question of danger: see (1910) 27 TLR 103, CA); *Mercer v South Eastern and Chatham Rly Co's Managing Committee* [1922] 2 KB 549 (defendants regularly locked the crossing gate when a train was due, and the plaintiff relying on this was hurt because they omitted to do so on a train's approach).

Conduct which has been held to constitute contributory negligence includes standing at the open door of a carriage while a train was slowing down and coming into the station (*Folkes v North London Rly Co* (1892) 8 TLR 269); attempting to get into a train while it was in motion, although it may have been started while the passenger was opening the door (*Avis v Great Eastern Rly Co* (1892) 8 TLR 693, CA); and getting out of a train at a station without first ascertaining whether it was alongside the platform (*Sharpe v Southern Rly Co* [1925] 2 KB 311, CA). However, it is not necessarily contributory negligence to lean against a carriage door (*Gee v Metropolitan Rly Co* (1873) LR 8 QB 161, Ex Ch; approved in *Grant v Sun Shipping Co Ltd* [1948] AC 549 at 567, [1948] 2 All ER 238 at 247, HL, per Lord du Parcq).

81. Doctrine of identification.

The defendant may plead the contributory negligence of an employee of the claimant where the employee is acting in the course of his employment[1]. On the other hand, the contributory negligence of an independent contractor is not imputed to the principal[2], and that of a driver is not imputed to a passenger[3], nor is that of a spouse imputed to the wife or husband[4]. When a child is accompanied by an adult the contributory negligence of the adult is not imputed to the child[5]. However, a child suing under the Congenital Disabilities (Civil Liability) Act 1976 is identified with the contributory negligence of the parent[6]. Similarly, a dependent suing under the Fatal Accidents Act 1976 is identified with the contributory negligence of the deceased[7].

1 *Carberry v Davies* [1968] 2 All ER 817, [1968] 1 WLR 1103, CA.

2 *Burrows v March Gas and Coke Co* (1872) LR 7 Exch 96, Ex Ch.

3 *The Bernina* (1888) 13 App Cas 1, HL (which applied the principle to ships); cf *Dawrant v Nutt* [1960] 3 All ER 681, [1961] 1 WLR 253 (passenger riding in a motor-cycle combination who knew its front lights were out of order was held liable for contributory negligence as against another driver who negligently collided with the motor-cycle).

4 *Mallett v Dunn* [1949] 2 KB 180, [1949] 1 All ER 973; *Berrill v Road Haulage Executive* [1952] 2 Lloyd's Rep 490, where a wife was driving her husband's car not as his employee or agent, and it was held that her contributory negligence did not prevent her husband recovering in full for damage to the car. This case, and *France v Parkinson* [1954] 1 All ER 739, [1954] 1 WLR 581, CA, also decided that the contributory negligence of a bailee is not imputed to a bailor. See also *Lampert v Eastern National Omnibus Co Ltd* [1954] 2 All ER 719n, [1954] 1 WLR 1047.

5 *Oliver v Birmingham and Midland Motor Omnibus Co Ltd* [1933] 1 KB 35.

6 See the Congenital Disabilities (Civil Liability) Act 1976 s 1(7); and **TORT** vol 45(2) (Reissue) PARA 339.

7 See the Fatal Accidents Act 1976 s 5; and PARA 75.

82. Apportionment.

In a case of contributory negligence the damages recoverable by the claimant are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage[1]. The court has regard both to the blameworthiness[2] of each party and the relative importance of the acts in causing the damage (often called causative potency)[3]. An appellate court will be reluctant to interfere with the apportionment of blame or damages by the trial judge[4], but it will do so if the trial judge has erred in principle, misapprehended the facts or made a clearly erroneous apportionment[5]. Where two or more defendants are liable for the damage, the claimant's contributory negligence should be assessed by comparing his conduct with the totality of the defendants' negligence and not with the extent to which each individual defendant contributed to the accident[6]. A partially successful claimant is entitled to full costs on the usual rule that costs follow the event[7].

1 Law Reform (Contributory Negligence) Act 1945 s 1(1): see PARA 75. If the claimant's negligence contributes within the meaning of the Law Reform (Contributory Negligence) Act 1945, the court is obliged to reduce the damages by some amount: *Boothman v British Northrop Ltd* (1972) 13 KIR 112, CA.

2 In considering the responsibility for the damage, the potential 'destructive disparity' between a motorist and a pedestrian can readily be taken into account as an aspect of blameworthiness: *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] RTR 115, [2003] All ER (D) 411 (Jul).

3 See *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, [1949] 1 All ER 620, CA; *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682, [1953] 2 All ER 478 at 486, HL, per Lord Reid. See also *Casey v Morane Ltd* [2001] ICR 316, [2000] All ER (D) 615, CA (employee, demoted following disciplinary proceedings for gross misconduct, predominant cause of which was employer's negligence, recovered damages for loss of earnings); *Eyres v Atkinsons Kitchens and Bedrooms Ltd* [2007] EWCA Civ 365, (2007) Times, 21 May, [2007] All ER (D) 201 (Apr) (employee injured in traffic accident caused by his own falling asleep while driving, but employer two-thirds responsible for requiring employee to work long hours). Where the contributory negligence consists of not wearing a seat belt in a motor vehicle, the damages should be reduced by 25% if the injuries would have been prevented altogether by wearing a belt, but only by 15% if the injuries would nevertheless have occurred but would have been less severe: *Froom v Butcher* [1976] QB 286, [1975] 3 All ER 520, CA. See also *Capps v Miller* [1989] 2 All ER 333, [1989] 1 WLR 839, CA (10% reduction for motor cyclist's failure to fasten a crash helmet). Apportionment may be complex, eg where a subsequent accident occurs to one of the parties in consequence of the original accident for which both are to blame: see *The Calliope* [1970] P 172, [1970] 1 All ER 624.

4 *The MacGregor* [1943] AC 197, [1943] 1 All ER 33, HL; *Ramoo Son of Erulapan v Gan Soo Swee* [1971] 3 All ER 320, [1971] 1 WLR 1014, PC; *Hannam v Mann* [1984] RTR 252, CA.

5 *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630, [1961] 1 WLR 401, CA; *Kerry v Carter* [1969] 3 All ER 723, [1969] 1 WLR 1372, CA; *Jennings v Norman Collison (Contractors) Ltd* [1970] 1 All ER 1121, CA; *Barrett v Ministry of Defence* [1995] 3 All ER 87, [1995] 1 WLR 1217, CA; *Brannan v Airtours plc* (1999) Times, 1 February, CA; *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] RTR 115, [2003] All ER (D) 411 (Jul). See also *Hatton v Cooper* [2001] EWCA Civ 623, [2001] RTR 544, [2001] All ER (D) 41 (May) (unwitnessed collision between two drivers; inappropriate to infer, on basis of employer's assessment of one driver as a careful driver, that other driver caused collision).

6 *Fitzgerald v Lane* [1989] AC 328, [1988] 2 All ER 961, HL.

7 *William A Jay & Sons v J S Veevers Ltd* [1946] 1 All ER 646. Where the claimant and the defendant claim against each other and both are found negligent the award of costs is discretionary: *Smith v W H Smith & Sons Ltd* [1952] 1 All ER 528, CA.

(2) JOINT TORTFEASORS

83. Joint tortfeasors.

A defendant cannot excuse himself for the consequences of his misconduct by proving that the negligence of a third person contributed to the claimant's injury[1]. Where a claimant sues two or more defendants who are liable on account of their negligent conduct in respect of the same damage[2], he will be awarded his entire damages against each defendant[3]. Although the court has power to apportion the damages as between the defendants[4], and frequently does so, in a joint action there can be only one judgment and one assessment of damages for the claimant; and damages against joint tortfeasors cannot be divided, even though the defendants sever their defences[5] and their culpability may vary[6].

Judgment recovered against any person[7] liable in respect of any debt or damage is no bar to an action[8], or the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage[9]. If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered[10] against persons liable in respect of the damage (whether jointly or otherwise) the claimant is not entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action[11].

1 *Grant v Sun Shipping Co Ltd* [1948] AC 549, [1948] 2 All ER 238, HL.

2 'Same damage' necessarily involves that it must be damage suffered by the same claimant: *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1, [1996] 1 WLR 675, CA.

3 See *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 31, HL, per Lord Atkinson; *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham of St Marylebone LC. See also *Nowlan v Brunswick Construction Ltd* (1973) 34 DLR (3d) 422, NB App Div. Accordingly, where a person travelling as a passenger in a vehicle belonging to a third person is injured by the defendant's negligence, he is entitled to recover in full against the defendant notwithstanding that the driver of the vehicle in which the claimant is travelling may also have been guilty of some negligence contributing to the accident: *The Bernina* (1888) 13 App Cas 1, HL; *Mathews v London Street Tramways Co* (1888) 58 LJQB 12, DC; *Mallett v Dunn* [1949] 2 KB 180, [1949] 1 All ER 973; *Lampert v Eastern National Omnibus Co Ltd* [1954] 2 All ER 719n, [1954] 1 WLR 1047. Where several tortfeasors have wrongly exposed a claimant to the same risk and the consequences of that risk have materialised, but due to the limited state of scientific knowledge the claimant cannot prove which tortfeasor's negligence actually caused the damage, then each of them will be liable to him: *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305 (employee

contracted mesothelioma after being exposed to asbestos dust by several different employers). Moreover, if the case is one of mesothelioma, the claimant may recover his damages in full from any of the defendants: see the Compensation Act 2006 s 3; and **DAMAGES**. If, however, some other form of harm is caused, each tortfeasor is liable only to the extent of his contribution to the risk: *Barker v Corus (UK) Ltd; Murray v British Shipbuilders (Hydrodynamics) Ltd; Patterson v Smiths Dock Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785 (decision revsd by the Compensation Act 2006 s 3, but underlying reasoning unaffected).

4 As to the court's power to apportion damages see **DAMAGES**.

5 See *Heydon's Case* (1612) 11 Co Rep 5a; *Austen v Willward* (1601) Cro Eliz 860; *Crane and Hill v Hummerstone* (1606) Cro Jac 118; *Cocke v Jennor* (1614) Hob 66; *Matthews v Coal* (1615) Cro Jac 384; *Greenlands Ltd v Wilmshurst and London Association for the Protection of Trade* [1913] 3 KB 507 at 528, CA, per Vaughan Williams LJ (revsd on other grounds sub nom *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 AC 15, HL).

Where the claimant has been contributorily negligent, apportionment of liability between the claimant and the defendants must be kept separate from apportionment of contribution between the defendants inter se: *Fitzgerald v Lane* [1989] AC 328, [1988] 2 All ER 961, HL. See also PARA 82.

6 *Eliot v Allen* (1845) 1 CB 18; *Clark v Newsam* (1847) 1 Exch 131. If a jury apportions the damages, judgment for the claimant may not be entered in the amounts so apportioned: see *Dawson v M'Clelland* [1899] 2 IR 486, CA; *Damiens v Modern Society Ltd* (1910) 27 TLR 164; *Chapman v Lord Ellesmere* [1932] 2 KB 431 at 471, CA, per Slesser LJ.

7 This includes the Crown: see the Civil Liability (Contribution) Act 1978 s 5.

8 Ie an action brought in England and Wales: Civil Liability (Contribution) Act 1978 s 6(4).

9 Civil Liability (Contribution) Act 1978 s 3. A person is liable in respect of any damage for the purposes of the Civil Liability (Contribution) Act 1978 if the person who suffered it, or anyone representing his estate or dependants (as defined in the Fatal Accidents Act 1976: see PARA 27), is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise): Civil Liability (Contribution) Act 1978 s 6(1), (3).

10 This includes a reference to an action brought for the benefit of the estate or dependants of the person who suffered the damage: see the Civil Liability (Contribution) Act 1978 s 6(2).

11 Civil Liability (Contribution) Act 1978 s 4. It should be noted that it is only the recovery of costs which is controlled by this provision.

6. REMEDIES AND PROCEDURE

(1) DAMAGES

84. Damages.

Damages[1] may be awarded for pecuniary loss including future pecuniary loss, such as loss of profits or earnings, although a deduction may be made for benefits received[2]. A person injured by another's wrong is entitled to general damages for non-pecuniary loss, such as pain and suffering and loss of amenity and enjoyment of life[3]. Where the death of the deceased has been caused by the act or omission giving rise to the cause of action, damages may be awarded for the benefit of the estate[4]. Dependants of the deceased may be able to claim compensation under the Fatal Accidents Act 1976[5].

1 Although the award of damages frequently follows an action for negligence, damages can also follow on from other actions, such as breach of statutory duty. The rules on damages are conceptually separate from those on negligence and are dealt with elsewhere in this work: see **DAMAGES**.

2 Incapacity and disability pensions are, because of their special nature, exceptions to the general rule that, prima facie, all receipts due to an accident must be set against losses claimed to have arisen because of the accident: *Longden v British Coal Corpn* [1998] AC 653, [1998] 1 All ER 289, HL (periodical sums received by plaintiff in period prior to normal retirement age did not fall to be deducted from his claim for loss of retirement pension).

3 See **DAMAGES** vol 12(1) (Reissue) PARA 851 et seq.

4 Ie by virtue of the Law Reform (Miscellaneous Provisions) Act 1934: see **DAMAGES**; **EXECUTORS AND ADMINISTRATORS**.

5 As to the Fatal Accidents Act 1976 see PARAS 25 et seq, 75; and **DAMAGES**.

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(2) TRIAL

85. Functions of judge and jury.

In those rare cases where there is still a jury in an action of negligence the respective functions of judge and jury are as follows[1]: the judge decides whether the defendant owed a duty to the claimant, directs the jury on the standard of care required, decides whether there is any evidence on which a jury may infer that that standard has not been attained, instructs the jury on causation and remoteness, and lays down the principles for assessing damages[2]. The jury decides whether the conduct of the parties fell below the standard of care as laid down by the judge, decides issues of causation and assesses the damages[3]. A court has a duty to come to a definite conclusion on the evidence, and so must not dismiss the action because of uncertainty as to which party was free from blame[4].

1 For a review of the use of juries in negligence (and civil cases generally) see *Williams v Beesley* [1973] 3 All ER 144, [1973] 1 WLR 1295, HL.

2 See *Metropolitan Rly Co v Jackson* (1877) 3 App Cas 193, HL.

3 See *Ryder v Wombwell* (1868) LR 4 Exch 32; *Banbury v Bank of Montreal* [1918] AC 626 at 670 et seq, HL, per Lord Atkinson; *Winnipeg Electric Co v Geel* [1932] AC 690, PC; cf *Giblin v McMullen* (1869) LR 2 PC 317; and see *Wright v Midland Rly Co* (1885) 1 TLR 406n, CA; *Brown v Great Western Rly Co* (1885) 1 TLR 406 (on appeal (1885) 1 TLR 614, CA).

4 *Bray v Palmer* [1953] 2 All ER 1449, [1953] 1 WLR 1455, CA.

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86. When case may be withdrawn from jury.

Unless there is some evidence of negligence the judge must not leave the issue of negligence to the jury, if there is one, and his failure to withdraw the case is a decision on which an appeal may lie[1]. If, at the close of the claimant's case, counsel for the defendant submits that he has no case to answer the judge may put him to his election whether he relies on his submission of no case, or whether he will call evidence himself[2]. If counsel then elects to stand on his

submission of no case he is bound by it[3]. If counsel has not been put to his election, and fails on his submission of no case, he is not precluded from calling evidence[4].

1 *Bridges v North London Rly Co* (1874) LR 7 HL 213. Even when he has heard all the evidence, a judge may rule 'no case' and withdraw the case from the jury: *Grinsted v Hadrill* [1953] 1 All ER 1188, [1953] 1 WLR 696, CA.

2 *Parry v Aluminium Corpn Ltd* (1940) 162 LT 236, CA; and see *Storey v Storey* [1961] P 63, [1960] 3 All ER 279, CA. Only in exceptional circumstances should a judge entertain a submission of no case to answer without putting the defence to its election: *Graham v Chorley Borough Council* [2006] EWCA Civ 92, [2006] PIQR P367, [2006] All ER (D) 288 (Feb).

3 *Payne v Harrison* [1961] 2 QB 403, [1961] 2 All ER 873, CA, where it was held that on appeal the matter is decided by considering the evidence as a whole, including the defendant's evidence, even though his submission of no case may have been wrongly rejected. As to the powers of an appellate court on an appeal in civil actions including the power to order a new trial see **CIVIL PROCEDURE** vol 12 (2009) PARA 1671.

4 *Yuill v Yuill* [1945] P 15, [1945] 1 All ER 183, CA; *Gilbert v Gilbert and Abdon (Adams intervening)* [1958] P 131, [1957] 3 All ER 604.